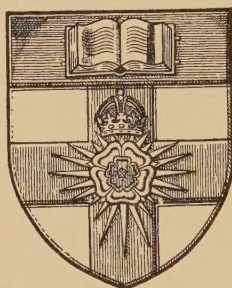


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REFERENCES

These reports contain references, which follow after the headnotes, to the following major works of legal reference described in the manner indicated below—

HALSBURY'S LAWS OF ENGLAND, SIMONDS EDITION

The reference 2 HALSBURY'S LAWS (3rd Edn.) 20, para. 48, refers to paragraph 48 on page 20 of Volume 2 of the third edition of Halsbury's Laws of England, of which Viscount Simonds is Editor-in-Chief.

HALSBURY'S LAWS OF ENGLAND, HAILSHAM EDITION

The reference 34 HALSBURY'S LAWS (2nd Edn.) 30, para. 26, refers to paragraph 26 on page 30 of Volume 34 of the second edition of Halsbury's Laws of England, of which Viscount Hailsham was Editor-in-Chief.

HALSBURY'S STATUTES OF ENGLAND, SECOND EDITION

The reference 26 HALSBURY'S STATUTES (2nd Edn.) 138, refers to page 138 of Volume 26 of the second edition of Halsbury's Statutes.

ENGLISH AND EMPIRE DIGEST

The reference 24 DIGEST 602, 6028, refers to case No. 6028 on page 602 of Volume 24 of the Digest.

There are three cumulative supplements to the Digest, described as Digest Supp., 2nd Digest Supp. and 3rd Digest Supp.; of these the first two include cases up to December 31, 1939, and December 31, 1951, respectively.

The reference 31 DIGEST (Repl.) 244, 3794, refers to case No. 3794 on page 244 of Digest Replacement Volume 31.

HALSBURY'S STATUTORY INSTRUMENTS

The reference 12 HALSBURY'S STATUTORY INSTRUMENTS 124, refers to page 124 of Volume 12 of Halsbury's Statutory Instruments, first edition.

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ENCYCLOPAEDIA OF FORMS AND PRECEDENTS, THIRD EDITION

The reference 15 ENCY. FORMS. & PRECEDENTS (3rd Edn.) 938, Form 231, refers to Form 231 on page 938 of Volume 15 of the third edition of the Encyclopaedia of Forms and Precedents.

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CORRIGENDA

[1958] 3 All E.R.

- p. 156. *JEFFREY v. KENT COUNTY COUNCIL.* Counsel for the plaintiff widow: read "*P. E. Webster* (for *John Davies*)" instead of as printed.
- p. 503. *REGIS PROPERTY CO., LTD. v. DUDLEY.* Line C.3: delete the sentence beginning "Apart from the difficulties" and ending "Sch. 1 to the Act."

THE ALL ENGLAND LAW REPORTS

INCORPORATING THE
LAW TIMES REPORTS
AND THE
LAW JOURNAL REPORTS

Re EL SOMBRERO, LTD.

[CHANCERY DIVISION (Wynn-Parry, J.), July 2,³ 1958.]

Company—Meeting—Court's power to convene meeting—Private company—Impracticability of conducting meeting in manner prescribed by company's articles—Application to court by member holding ninety per cent. of company's shares—Opposition by directors—Companies Act, 1948 (11 & 12 Geo. 6 c. 38), s. 135 (1).

The applicant held ninety per cent. of the shares of a private company, which was incorporated in March, 1956, and each of the two directors of the company held five per cent. of the shares. By the company's articles of association, the quorum for general meetings of the company was two members present in person or by proxy, and, if within half an hour from the time appointed for a meeting a quorum was not present, the meeting, if convened on the requisition of members, was dissolved. No general meeting of the company had ever been held. On Mar. 11, 1958, the applicant requisitioned an extraordinary general meeting, under s. 132 of the Companies Act, 1948, for the purpose of passing resolutions removing the two directors and appointing two other persons as directors. The directors having failed to comply with the requisition, the applicant himself convened an extraordinary general meeting for Apr. 21, 1958. The directors deliberately did not attend the meeting either in person or by proxy, and, as a quorum was not present, the meeting was dissolved. On Apr. 29, 1958, the applicant served a special notice, under s. 142 of the Act of 1948, of his intention to move the same resolutions, under s. 142 and s. 184, at the next extraordinary general meeting of the company. On the same day he took out an originating summons asking for a meeting to be called by the court, under s. 135 (1)*, for the purpose of passing the resolutions, and for a direction that one member of the company should be deemed to constitute a quorum at such meeting. The application was opposed by the directors.

* Section 135 (1) of the Companies Act, 1948, provides: "If for any reason it is impracticable to call a meeting of a company in any manner in which meetings of that company may be called, or to conduct the meeting of the company in manner prescribed by the articles or this Act, the court may, either of its own motion or on the application of any director of the company or of any member of the company who would be entitled to vote at the meeting, order a meeting of the company to be called, held and conducted in such manner as the court thinks fit, and where any such order is made may give such ancillary or consequential directions as it thinks expedient; and it is hereby declared that the directions that may be given under this sub-section include a direction that one member of the company present in person or by proxy shall be deemed to constitute a meeting."

Held: (i) as a practical matter the desired meeting of the company could not be conducted in accordance with the articles of association and the court had jurisdiction under s. 135 (1) of the Companies Act, 1948, to order a meeting to be held notwithstanding opposition by the shareholders other than the applicant.

(ii) an order for the meeting to be held and that one member present should constitute a quorum would be made because (a) to refuse the application would be to deprive the applicant of his statutory right under s. 184 to remove the directors by means of an ordinary resolution, and (b) the respondent directors had failed to perform their statutory duty to call an annual general meeting for the reason that, if they had convened a general meeting, they would have ceased to be directors.

[As to the convening of a company meeting by the court, see 6 HALSBURY'S LAWS (3rd Edn.) 334, para. 655.

For the Companies Act, 1948, s. 135 (1), see 3 HALSBURY'S STATUTES (2nd Edn.) 565.]

Cases referred to:

(1) *Rayfield v. Hands*, [1958] 2 All E.R. 194.

(2) *Re Edinburgh Workmen's Houses Improvement Co.*, 1935 S.C. 56; [1934] S.L.T. 513.

Motion.

The applicant, Harry Laubscher, appealed from an order made by Mr. Registrar BERKELEY on May 21, 1958.

By an originating summons under R.S.C., Ord. 53B, r. 8 (f), to which the company and its directors, Samuel Edward Salaman and Allan William Lewis Ramella, were made respondents, the applicant sought the following relief under s. 35 (1) of the Companies Act, 1948: (i) that the personal respondents, as directors of the company, should forthwith call, hold and conduct (or, alternatively, that the court might convene) an extraordinary general meeting of the company for the purpose of considering, and, if thought fit, passing, the resolutions set out in a schedule to the summons; (ii) a direction that one member of the company present in person or by proxy should be deemed to constitute a quorum at such meeting; (iii) ancillary and consequential directions. The resolutions set out in the schedule were for the removal of the two personal respondents from office as directors and the appointment of two other persons as directors in their place. In a considered judgment dated May 21, 1958, the learned registrar dismissed the application and made the order now appealed from.

The relevant facts, as stated in the judgment of the learned registrar, were as follows. The company was a private company, incorporated on Mar. 21, 1956, as a company limited by shares. It had an authorised and issued share capital of £1,000 divided into one thousand shares of £1 each. The applicant was the registered holder of nine hundred shares, which he had acquired in July, 1956, by transfer from former shareholders. Each of the personal respondents was the registered holder of fifty shares. The personal respondents were already directors of the company when the applicant acquired his shares, and they had been directors ever since. They drew an agreed remuneration of £20 a week each. They claimed that they were the sole directors, but the applicant claimed that he had been a director since Jan. 20, 1958. No general meeting of the company had ever been held, and no annual return had been filed. The applicant had financed the company to the extent of some £18,000. The company's articles of association (which adopted the regulations in Part 2 of Table A in Sch. 1 to the Companies Act, 1948, subject to certain modifications)

A provided (so far as was material to this case) that the quorum for general meetings of the company should be two members present in person or by proxy and that, if within half an hour from the time appointed for a meeting a quorum should not be present, the meeting, if convened on the requisition of members, should be dissolved*.

B The applicant and the personal respondents had quarrelled, and an action in the Chancery Division had been pending since Mar. 11, 1958, between the applicant, as plaintiff, and the respondents, as defendants. In that action a variety of matters in relation to the respondent company were in dispute between the parties. On Mar. 11, 1958, the applicant, pursuant to s. 132 of the Companies Act, 1948, requisitioned an extraordinary general meeting of the company for the purpose of passing the resolutions set out in the schedule to the originating summons in the present matter. As the personal respondents did not comply with the requisition, the applicant himself convened an extraordinary general meeting for Apr. 21. The personal respondents deliberately did not attend the meeting either in person or by proxy, and, accordingly, under the company's articles the meeting was dissolved. On Apr. 29, 1958, the applicant served a special notice, under s. 142 of the Companies Act, 1948, of his intention pursuant to that section and to s. 184 to move the same resolutions at the next extraordinary general meeting of the company. On the same day the applicant issued the originating summons in the present matter. The application was strongly opposed by the respondents.

E In his judgment the learned registrar said that, following *Rayfield v. Hands* (1) ([1958] 2 All E.R. 194), he had to proceed on the basis that, as the respondent company was a private company, under s. 20 of the Act of 1948 the articles of association constituted a contract between the applicant and the personal respondents in relation to their rights as members of the company. He went on to say:

F "It is apparent, therefore . . . that under the terms of the contract between the applicant and the personal respondents constituted by the articles of association in this case, the applicant, so long as the shareholdings in the company remain as they have at all material times, could never exercise his voting power in respect of his shareholding for the purpose of passing any resolution at a meeting of the company requisitioned by him under s. 132 of the Companies Act, 1948, unless one or other of the personal respondents attended that meeting either in person or by proxy, since in default of such attendance the meeting had to be dissolved. There is no legal obligation under the articles or otherwise on any of the members of the company to attend the meeting and each of the respondents in his capacity of shareholder has the right of absenting himself from any meeting, whatever be his motive for so doing."

H The registrar held that the court should not exercise its powers under s. 135 so as to vary the rights of the respondents under their contract in order to facilitate their removal under s. 184, and dismissed the application.

I Charles Russell, Q.C., and L. H. L. Cohen for the applicant.
I. J. Lindner, Q.C., and Raymond Walton for the respondents.

WYNN-PARRY, J.: This is a motion by the applicant, who holds ninety per cent. of the shares of the company, that an order of Mr. Registrar BERKELEY of May 21, 1958, by which he refused the relief claimed by the originating summons in this matter, namely, to direct the convening and holding of a

* See art. 1 of Part 2 and art. 54 of Part 1 of Table A of Sch. 1 to the Companies Act, 1948; 3 HALSBURY'S STATUTES (2nd Edn.) 823 and 807.

meeting under s. 135 of the Companies Act, 1948, may be discharged or varied. A
The learned registrar gave a considered judgment in this matter, and in the
course of it he stated the relevant facts fully*, and I do not propose to set out
the facts again in this judgment.

The first point of law which arises involves the construction of s. 135 (1),
the examination being directed to consider the scope of the phrase: B

“ If for any reason it is impracticable to call a meeting of a company
in any manner in which meetings of that company may be called, or to
conduct the meeting of the company in manner prescribed by the articles
or this Act . . . ”

It is to be observed that the sub-section opens with the words “ If for any
reason ”, and, therefore, it follows that the sub-section is intended to have,
and, indeed, has by reason of its language, a necessarily wide scope. The C
next words being “ it is impracticable to call a meeting of a company ”, the
question arises, what is the scope of the word “ impracticable ” ? It is conceded
(certainly it was conceded below) that the word “ impracticable ” is more
limited than the word “ impossible ”, and it appears to me that the question D
necessarily raised by the introduction of the word “ impracticable ” is merely
this: Examine the circumstances of the particular case and answer the question
whether, as a practical matter, the desired meeting of the company can be
conducted, there being no doubt, of course, that it can be convened and held.
On the face of s. 135 (1), there is no express limitation which would operate to
give those words “ is impracticable ” any less meaning than that which I have E
stated, and I can find no good reason in the arguments which have been addressed
to me on behalf of the respondents for qualifying in any way the force of the
word “ impracticable ” or the interpretation which I have placed on it, and,
therefore, on that point I am in favour of the applicant.

It was contended that the court could not direct a meeting under s. 135 (1),
or, certainly, ought not to do so, where there was, as there is here, opposition,
and, indeed, strong opposition; and in the course of his judgment the learned
registrar said: F

“ So far as I am aware there has never been a case where the court has
made an order under s. 135 in the face of opposition of such an order . . . ” G

It will be observed that the learned registrar is careful not to go so far as to say,
as a conclusion, that the court has no jurisdiction to make an order under s. 135 (1)
in the face of opposition. I can find nothing in the language of the sub-section
which would even indicate that the jurisdiction can be invoked only if, at least,
there is no opposition, and I hold that, on the true construction of the sub- H
section, there is nothing to prevent the court intervening in a proper case and
where the application before it is opposed by other shareholders.

It is interesting to see that the learned registrar, having made the observation
which I have quoted as to the absence of any authority for the proposition
that an order could be made under s. 135 in face of opposition, goes on to say:

“ . . . and I do not consider that in the circumstances of this case the court
ought to exercise its discretion by making such an order.” I

What, as I read his judgment, really operated in his mind was that the two
personal respondents had the power to prevent the desired meeting being held.
Having considered *Re Edinburgh Workmen's Houses Improvement Co.* (2) (1935
S.C. 56), the learned registrar said:

* The facts are set out at pp. 2, 3, ante.

A " That case affords me some guidance as to the meaning of ' impracticable ' in s. 135 in relation to the quorum provisions of articles and perhaps would justify me in holding that it is impracticable in the circumstances of the present case to conduct a meeting of the company in the manner prescribed by the articles for the purpose of passing the resolutions mentioned in the schedule to the originating summons since the personal respondents will see to it that a quorum is never present at a meeting convened for that purpose. But beyond that the case does not assist me for it is clearly distinguishable on its facts from the present case in that there the court made an order in relation to a public company to enable resolutions to be passed which an overwhelming majority of the shareholders in number and value wanted passed, to which no member had expressed dissent and in circumstances in which the three non-assenting shareholders with their forty-eight shares would still have an opportunity, if so minded, of coming before the court to express their views and oppose any order which would render the resolutions effective. Whereas in the present case I am asked to make an order in relation to a private company at the request of one member (the applicant) in the face of strenuous opposition from the other two (the personal respondents) to enable the one to remove the other two from their directorships, notwithstanding that under the terms of the contract by which their respective rights are governed the two respondents are entitled to prevent the applicant from removing them at a meeting requisitioned by him."

E Later, the learned registrar referred to an argument which had been put before him by counsel for the applicant, namely, that the applicant, as a majority shareholder, was entitled to remove the personal respondents from the board under s. 184, and that the court would be stultifying the applicant's statutory powers if it refused to make the order which was asked for. The learned registrar commented on that argument in these words:

F " I cannot accept that proposition as correct. His power of removing a director under s. 184 is limited to doing so by ordinary resolution and under the terms of his contract with the respondents they have power to prevent him from passing such a resolution if they wish to do so. I do not consider that the court ought to exercise its powers under s. 135 in such a way as to deprive the respondents against their will of that power."

G With all respect to the learned registrar, I think those passages proceed on a misconception. It was conceded by counsel for the respondents, and, in my view, very properly conceded, that it was not possible to say that the respondents, by virtue of the articles, had such right as is implicit in the use of the word " entitled " by the learned registrar to prevent the applicant from holding and conducting the meeting. They have, it is true, a power to prevent him from doing so, but that power is not derived from the articles; it is derived from the accidental distribution of the shareholding in this company, and that, to my mind, explains the whole difficulty which has arisen. I therefore hold that I have jurisdiction in this case, and there is nothing to prevent me exercising the discretion which is given under s. 135 (1), if I choose to exercise it.

I It is true that I am sitting as an appellate court, but I am entitled to consider the question of discretion, because, in my view, as I have held, the learned registrar has misdirected himself on a question of law. In my judgment, this is eminently a case in which the court ought to exercise its discretion; first, because, if the court were to refuse the application, it would be depriving the

applicant of a statutory right which, through the company, he is entitled to exercise under s. 184 (1) to remove the respondents as directors. Secondly (and I think that this is a proper matter to take into account as part of the reasons for deciding to exercise my discretion), because the evidence disclosed that the respondents are failing to perform their statutory duty to call an annual general meeting. The period within which they should have held an annual general meeting expired at some date (it matters not which) in October, 1957. Their excuse, in the evidence, is that there would be no use in convening and holding an annual general meeting, because the accounts for the first period of the company's history are not yet available. I have read the evidence with care, and I do not accept it as bona fide evidence. There is a clear statutory duty on the directors to call the meeting whether or not the accounts, the consideration of which is only one of the matters to be dealt with at an annual general meeting, are ready or not. It cannot possibly serve as an excuse for failing to perform that statutory duty. It is obvious that the only reason why the respondents refuse to call an annual general meeting is because the inevitable result of convening and holding that annual general meeting would be that they would find they had ceased to be directors. Reference was made to other proceedings between the parties and to a motion for the committal of the applicant for the alleged offence of endeavouring to procure that one of the respondents should not be present in court. It appears to me that I cannot properly take those other matters into account. I have no knowledge of them at all, and, were I in any way to take them into account, I would be, at any rate to some extent, prejudging the issues between the parties one way or the other. For these reasons, therefore, I propose to accede to this application and to direct a meeting of the company to be held under the power given me by s. 135 of the Companies Act, 1948.

[HIS LORDSHIP made an order that an extraordinary general meeting of the company should be held on a certain day at a particular time and place for the purpose of considering and, if thought fit, passing the resolutions appended to the originating summons, that one member of the company present in person or by proxy should be deemed to constitute a quorum and that no further notice of the meeting need be given.]

Solicitors: *Herbert Oppenheimer, Nathan & Vandyk* (for the applicant); *Callingham, Griffith & Bate* (for the respondents).

[*Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.*]

A

GOODYEAR TYRE & RUBBER CO. (GREAT BRITAIN), LTD.
v. LANCASHIRE BATTERIES, LTD.

[COURT OF APPEAL (Lord Evershed, M.R., Romer and Ormerod, L.J.J.), July 4, 8, 1958.]

B

Restrictive Trade Practices—Price maintenance—Sale by retailer below fixed price—Notice of the condition relating to price—What constitutes notice—Restrictive Trade Practices Act, 1956 (4 & 5 Eliz. 2 c. 68), s. 25 (1).

C

The plaintiffs imposed, as a condition of sale, a price restriction on the sale of tyres manufactured by them. The British Motor Trade Association issued a circular, dated April, 1957, of which, among other traders, the defendants received a copy. The circular was headed "Restrictive Trade Practices Act, 1956", and the sub-heading was "List and addresses of manufacturers . . . who prescribe conditions as to price for their respective specified products". Paragraph 1 contained a summary of the effect of s. 25 of the Act of 1956 whereby a supplier of goods sold by him subject to a price restriction might enforce the restriction against a person not a party to the sale who acquired the goods "with notice of" the price restriction. In para. 2 it was stated that the association had been authorised by the "undermentioned manufacturers" to give notice on their behalf that they each individually supplied "for resale each of their new products . . . specified in the schedule subject to conditions as to price, including a condition that they shall not be resold or offered for resale at a price other than the appropriate price prescribed by the manufacturer . . . concerned". Paragraph 4 was: "Details of the conditions as to price prescribed for any of the specified products may be obtained on application to the manufacturer . . . concerned". The schedule to the circular gave the names of the manufacturers on whose behalf the circular was issued, their addresses, and the products in respect of which conditions relating to price had been prescribed. The plaintiffs' name and address appeared in the schedule and their specified goods included tyres. The plaintiffs' trade price list contained prices and price maintenance conditions, para. 5 (b) of which provided that no person should sell the plaintiffs' products at, in effect, lower prices than those set out in the price list.

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In February, 1958, the defendants sold tyres manufactured by the plaintiffs at less than the prescribed price. The plaintiffs applied for an interlocutory injunction under s. 25 of the Act of 1956 to restrain the defendants from selling goods manufactured by the plaintiffs at prices lower than those prescribed.

H

Held: the notice given by the circular of April, 1957, was sufficient "notice of the condition" as to price restriction to satisfy s. 25 (1) of the Restrictive Trade Practices Act, 1956, for that enactment required only notice of the fact that there was such a condition, not notice stating the actual terms of the price restriction; and, therefore, the price condition was enforceable against the defendants under s. 25.

I

Thompson v. London, Midland & Scottish Ry. Co. ([1930] 1 K.B. 41) applied.

Decision of UPJOHN, J. ([1958] 2 All E.R. 324) reversed.

[**Editorial Note.** The Court of Appeal found guidance in the "ticket" cases. These cases are grouped and discussed in 4 HALSBURY'S LAWS (3rd Edn.) 185, 186, paras. 463, 464.

For the Restrictive Trade Practices Act, 1956, s. 25, see 36 HALSBURY'S STATUTES (2nd Edn.) 958.]

Cases referred to:

- (1) *National Phonograph Co. of Australia, Ltd. v. Menck*, [1911] A.C. 336; 80 L.J.P.C. 105; 104 L.T. 5; 28 R.P.C. 229; 36 Digest (Repl.) 827, 1820.
- (2) *Columbia Graphophone Co., Ltd. v. Murray*, (1922), 39 R.P.C. 239; 36 Digest (Repl.) 924, 2779.
- (3) *Thompson v. London, Midland & Scottish Ry. Co.*, [1930] 1 K.B. 41; 98 L.J.K.B. 615; 141 L.T. 382; 8 Digest (Repl.) 115, 744.
- (4) *County Laboratories, Ltd. v. J. Mindel, Ltd.*, [1957] 1 All E.R. 806; [1957] 1 All E.R. 861 n.; [1957] Ch. 295; 3rd Digest Supp.
- (5) *Manchester Trust v. Furness*, [1895] 2 Q.B. 539; 73 L.T. 110; sub nom. *Manchester Trust, Ltd. v. Turner, Withy & Co., Ltd.*, 64 L.J.Q.B. 766; 20 Digest 319, 659.
- (6) *Greer v. Downs Supply Co.*, [1927] 2 K.B. 28; 96 L.J.K.B. 534; 137 L.T. 174; Digest Supp.

Interlocutory Appeal.

The plaintiffs appealed from an order of UPJOHN, J., dated May 2, 1958, and reported [1958] 2 All E.R. 324. The plaintiffs applied, by motion, for an interlocutory injunction under the Restrictive Trade Practices Act, 1956, s. 25 (4), restraining the defendants from reselling or offering for resale any tyres, tubes or other goods manufactured and sold by the plaintiffs at prices other than the prices prescribed by the plaintiffs for the resale of such goods. UPJOHN, J., dismissed the application on the ground that such notice as was given by a circular which had been received by the defendants, and on which the plaintiffs relied, did not satisfy s. 25 (1) of the Act of 1956, because it did not give express notice of the actual terms and conditions sought to be enforced. The terms of the circular are stated in the judgment of LORD EVERSHED, M.R.

G. T. Aldous, Q.C., and *S. J. Waldman* for the plaintiffs.

D. H. Mervyn Davies for the defendants.

LORD EVERSHED, M.R.: This appeal has raised a question of some importance on the meaning of s. 25 (1) of the Restrictive Trade Practices Act, 1956. The sub-section reads:

"Where goods are sold by a supplier subject to a condition as to the price at which those goods may be resold, either generally or by or to a specified class or person, that condition may, subject to the provisions of this section, be enforced by the supplier against any person not party to the sale who subsequently acquires the goods with notice of the condition as if he had been party thereto."

An advertisement had appeared* in a local paper in the North of England which stated that a trader known as Tower Battery Depot (which is a name under which the defendants trade) was selling certain goods with a 2s. in the £ discount on all those goods. The advertisement gave a list of the goods comprehended in the offer, and that list included tyres; that is obviously motor tyres, since the advertisement was addressed to "motorists". The advertisement having come to the notice of the plaintiffs, the British Motor Trade Association, as the agent of the plaintiffs, proceeded to send a gentleman to the premises of the defendants, and that gentleman gave what is commonly called a "trap order" to the defendants: that is to say, he gave an order for two Goodyear tyres of a certain type, not because he particularly wanted them, but in order to discover whether in fact the defendants would sell those tyres at less than what is called their "list price". There was some question in the evidence of what had occurred between this representative of the British Motor Trade Association and the defendants, but in the end it is tolerably clear (and no argument about it has been addressed to us) that the two tyres were sold† by the defendants to

* The advertisement appeared in the "Evening Telegraph" of Feb. 12, 1958.

† The sale took place on Feb. 21, 1958.

A this gentleman at a price which represented their list price (to use again the common expression) less a discount of ten per cent., or 2s. in the £. Therefore, the present proceedings were brought in order to restrain the defendants from doing that which, it is said, s. 25 (1) of the Act of 1956 entitles the plaintiffs to prevent them doing.

B That, I think, is probably a sufficient statement of the facts, apart from those facts which relate to the precise information about the so-called "list price" which the defendants had and that which, on the other hand, it is said that they ought to have had or might have had. The distinction is, I think, best made clear by reference to two exhibits. The first is a circular issued by the British Motor Trade Association. It is headed "Restrictive Trade Practices Act, 1956" and, on the face of it, purports to be a "List and addresses of manufacturers and concessionaires who prescribe conditions as to price for their respective specified products."* Inside the circular (at the top of p. 2) there is this heading:

"Important notice under the Restrictive Trade Practices Act, 1956.

To: All Traders in Motor Goods. Take notice that: "

Then in the first numbered paragraph is a recapitulation of s. 25. Paragraph 2 reads:

D "The undermentioned manufacturers . . . have authorised the British Motor Trade Association to give notice on their behalf that they each individually supply for resale each of their new products of the kind or kinds specified in the schedule subject to conditions as to price, including a condition that they shall not be resold or offered for resale at a price other than the appropriate price prescribed by the manufacturer . . . concerned, plus . . . purchase tax . . . and . . . delivery charges . . ."

E Paragraph 4 reads:

"Details of the conditions as to price prescribed for any of the specified products may be obtained on application to the manufacturer . . . concerned, quoting details of the goods in question."

F The schedule contains the names of a large number of manufacturers and concessionaires, and among them is the name of the plaintiffs, Goodyear Tyre & Rubber Co. (Gt. Britain), Ltd., with an address, and, under the heading "Specified Products", "All Goodyear tyres, tubes and flaps". It is not in issue that the defendants had, at all relevant dates, a copy of this circular, which is dated April, 1957. Since then, later editions of it, with some immaterial alterations, have appeared, but for the purposes of this motion the circular dated April, 1957, is the relevant one, and that is the circular which the defendants indubitably had seen.

G It will be observed that the circular is issued by the British Motor Trade Association, stating that they are agents of each of the manufacturers. No point has been taken as to the validity of that claim, and it must, therefore, be taken that the British Motor Trade Association were in truth the agent of the plaintiffs, among others, to make the statements made in the paragraphs which I have read. It is plain that those paragraphs, by themselves, fall considerably short of informing a reader of all the precise conditions as to price which affected the resale of Goodyear tyres in the hands of a retailer. In order to discover the full import of those conditions, it is necessary to turn to another exhibit, which is the trade price list issued by the plaintiffs. It contains over thirty pages, of which thirty consist of details of the appropriate prices to be charged by a retail trader and a wholesale trader for the numerous kinds of tyres, tubes, etc., manufactured or marketed by the plaintiffs. The particular tyres with which the trap order founding this motion was concerned are called "Suburbanite" tyres, and on p. 6 of the plaintiffs' trade price list "Suburbanite" tyres, of the particular dimensions dealt with, are listed for retail sale at the price of £6 18s. per

* This was the sub-heading on p. 1 of the circular.

cover. At the end of the price list is a section, consisting of two pages headed "Conditions of Sale". Paragraph 4 of the conditions of sale is headed "Notice of Conditions", and reads: A

"Purchasers of all products manufactured, sold or supplied by the [plaintiffs], undertake and agree to bring fully to the notice of all traders, commercial vehicle users and other persons with whom they may deal, the terms of these conditions of sale." B

Paragraph 5 is headed "Price Maintenance" and is divided into five sub-paragraphs. The first two, sub-paras. (a) and (b), read:

"(a) No person shall sell . . . any of the [plaintiffs'] products to any trader at prices and/or terms directly or indirectly higher or lower than the prices specified in the [plaintiffs'] current trade price lists and/or the terms for the time being authorised by [the plaintiffs]. (b) No person shall sell or supply any of the [plaintiffs'] products to any commercial vehicle user [other than as stated] or to any other person whatsoever, except a trader, at prices and/or terms directly or indirectly higher or lower than the prices specified in the [plaintiffs'] current retail price list . . ." C

Then in para. 6 there are other conditions which include a restriction on advertisement for sale at prices otherwise than in accordance with the plaintiffs' trade price list. The vital paragraph for present purposes is para. 5 (b), because that is the one which affects sales by retailers. It will be noted that there are two features about it, which, no doubt, are necessary, but might be said to be special. They make exceptions in cases of sales to traders as therein mentioned, and the paragraph also refers to prices being higher or lower "directly or indirectly". The reason for the latter obviously is that it would include, among other things, cases of sales where other goods are taken in part exchange or where the terms of the sale are by way of hire-purchase. In other words, it is not quite so simple as the case referred to in argument where a man buys over the counter in a tobacconist's shop a packet of twenty Players' cigarettes. To such a transaction part exchange and hire-purchase would not be applicable. It follows, therefore, that a full comprehension of the price conditions is quite a complex subject, and it is no wonder that the plaintiffs' trade price list contains as many pages as it does. What I have read emphasises the main issue which has been debated before us and which is this: Is it sufficient for the purposes of this motion (and it is only with that that we are concerned) that the defendants had the notice which was contained in para. 2 and para. 4 of the British Motor Trade Association's circular? Or, in order to comply with the requirements of s. 25 (1), should the defendants, if they are liable to restraint by the court, have been given full notice of the exact terms and conditions as they are found in the plaintiffs' trade price list? D

It was the view of the learned judge, as it was the argument of counsel for the defendants, before us, that a proper reading of the terms of s. 25 (1) meant that the latter of the two alternatives which I have posed was the correct answer to the question; in other words, to use the language of the learned judge, the defendants could not be liable to procedure for an injunction unless it could be shown that they had knowledge of the actual terms of the relevant condition. With the utmost respect to the learned judge, I have not been able to share that view. I refer again to the sub-section to observe, first, that it is dealing with a specific kind of condition: "Where goods are sold by a supplier subject to a condition as to the price at which those goods may be resold . . ." Then the sub-section proceeds to say that that condition (namely, the price condition) may be enforced against (in this case) a retailer, provided that the retailer acquires the goods or has acquired the goods with notice of the condition. Again, that is the price-regulating condition. Obviously, therefore, it would not be enough for a retailer, against whom an injunction is sought, to have been told only "there are conditions of some sort affecting these goods". He must E
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I

A have notice of *the* condition—that is the condition as to price fixing—with which the sub-section is concerned.

The learned judge, in reaching his conclusion, rejected the argument that the case could be treated as governed, or, at least, sufficiently guided, by certain decisions of the courts in regard to patented articles. *National Phonograph Co. of Australia, Ltd. v. Menck* (1) ([1911] A.C. 336) was one of these decisions, and
 B *Columbia Graphophone Co., Ltd. v. Murray* (2) ((1922), 39 R.P.C. 239) was another. It is, no doubt, true that those cases and others like them are authority for the view that, if someone acquires for resale a patented article, he does so on terms that he is treated as being licensed to resell, and he is bound accordingly, on any resale, to observe any conditions which the patentee may have imposed and of which he has notice, in the sense that the fact or existence of the condition
 C has been brought to his mind, even though he may only be told that there are conditions, without being told what their exact terms were: see *Columbia Graphophone Co., Ltd. v. Murray* (2). The learned judge did not feel that these patent cases formed a safe guide, on the ground (and I respectfully agree) that they really depend on the special proprietary right which, by statute, a patentee has in regard to goods manufactured in accordance with the patent. Counsel
 D for the plaintiffs in this court drew our attention also, however, to other cases in which conditions and terms of conditions became relevant for consideration, namely, what one may loosely call the “railway ticket” cases. One of those (and I refer to one because it will suffice) is *Thompson v. London, Midland & Scottish Ry. Co.* (3) ([1930] 1 K.B. 41), a decision of this court. In that case a passenger had taken an excursion ticket, on the back of which was printed a
 E notice that the ticket was subject to certain specified conditions which could be discovered from looking at other documents issued by the railway company. The passenger herself was unable to read, and some of the matters in issue turned on that fact. In truth, however, the ticket had been acquired for her by a niece (who could read) as her agent. The question (so far as relevant) was whether the passenger must be treated as bound by the published conditions,
 F although all that she had been told, through her agent, was that the contract of carriage was subject to those conditions and that, if she wanted to find out exactly what they were, she must get hold of this other literature and read it. It was held by this court that the decision in favour of the railway company was justified and that the notice which the passenger had received, in the form that I have stated, sufficed. I shall return to that case a little later; for present
 G purposes, the point which is of value is that one may have sufficient notice of a condition to be bound by its terms although one has not been told, or had put into one’s hands, a full statement of exactly what the terms of that condition are.

I think also that counsel for the plaintiffs was justified in reminding us of the situation in regard to this type of condition before the Act of 1956 came into force. Certain methods had been adopted by manufacturers, by way of what
 H are called “black lists”, of dealing with traders who disregarded their attempts at price regulation; but that was something which was, of course, outside the scope of legal action. The difficulty which had faced a manufacturer or supplier seeking (through the courts) to restrain sales by, for example, a retailer otherwise than at the listed prices was that there was no contract, no contractual nexus, between the manufacturer and the retailer; or, if some form of contract was brought into existence, then it was found that there was no consideration for it
 I on which a manufacturer could enforce the conditions. Obviously, s. 25 (1) is to be judged against that background, and the particular significance of what I have been saying lies in the last seven words: “as if he [the retailer] had been party thereto”, that is, to the contract relating to the supply of goods.

I come back to the first question (and the main question) which we have to decide: What is the scope or limit of the words “with notice of the condition”? Prima facie, it would appear to me that, if Parliament had meant that the retailer must know the actual terms of the condition, as the learned judge seems to have

thought, Parliament would have said so. The word "notice" to a lawyer, in my judgment, means something less than full knowledge. It means, no doubt, that the thing of which a man must have notice must be brought clearly to his attention. What, in different cases, may be sufficient notice is a matter which will be decided when those cases come before the courts; but in this case it seems to me that two things are clearly established: first, that the defendants had been told and knew (had been expressly told and clearly knew) that tyres which had been manufactured and supplied by the plaintiffs had had imposed on them by the plaintiffs a condition as to price, including a condition that they should not be resold at other than the appropriate price which the plaintiffs had prescribed. That is clear. The defendants had, furthermore, been told (see para. 4 of the circular) that the details of the condition, that what was the appropriate price in any given case for the resale of those tyres, could be obtained on application to the manufacturer at the address which was stated in the same circular. In my judgment, that constituted in this case "notice of the condition" within the requirement of s. 25 (1).

Counsel for the defendants complained that so to read the sub-section was to read into it the words "existence of the", as though the sub-section had said, not merely "with notice of the condition", but "with notice of the existence of the condition". There are two answers to that. One is that counsel's own argument would appear equally to require to be read into the sub-section the words "the exact terms of" before the words "the condition". I think that it would also require the word "knowledge" to be substituted for the word "notice", and, if the learned judge was right, the adjective "actual" must also be understood in addition to the word "terms". A second answer is that the construction of the sub-section that I have stated requires, in my judgment, no reading in of anything. "Notice of the condition" means, *prima facie*, I should have thought, "notice of the fact of the condition". The only question is whether the notice which the defendants here had was clear enough to indicate and bring to bear on the mind of the defendants the condition sought to be enforced. I think that the railway ticket cases provide some assistance. They show what, in certain circumstances, will be notice of something by which one is later to be regarded as bound. It is, of course, true that in the railway ticket cases the individual concerned was making a contract of carriage and the notice on the back of the ticket was part of the contract. It was one of the terms of the contract. But then I come back to the significance of the last words of s. 25 (1), "as if he had been party thereto", for the presence of those words seems to me to justify approaching this case by asking the question: Supposing the defendants had made a contract with the plaintiffs to buy these two tyres and this circular had been one of the terms of the contract, would that have been sufficient notice of the condition within the meaning of the sub-section? As I have said, I think that the railway ticket cases lend substantial support to the view that it would have been. Indeed, as I understood the argument of counsel for the defendants, if there had been such a contract, then the circular would have been sufficient notice, as that phrase is used in the sub-section. I understood counsel to go further and say that, if the defendants had in fact received, not the whole of the green exhibit, but the end pages of it, headed "Conditions of Sale", that would have qualified as notice of the condition within the sub-section, particularly because then it would have been made plain that there were exceptional cases—sales to a trader, for example—and it would have also brought to the mind of the defendants the significance of the words "directly or indirectly". It still would not, of course, have informed the defendants what the actual price, expressed in pounds and shillings, was; and I find great difficulty, if the retailer is not to have full knowledge of the whole of the actual terms, in seeing where the line can properly be drawn. Fortunately, it is quite unnecessary in this case to attempt any precise statement of it. The question here is: Did the defendants, in the circumstances here proved, have notice of

- A the condition as specified in the sub-section? It certainly cannot be said that the circular said anything that was incorrect. It said that the price prescribed was the "appropriate" price, and that would, I should have thought, cover all the special cases in which the appropriate price might have been a somewhat special price or one different from the ordinary price. However that may be, I have, for the reasons which I have stated at some length out of respect for
- B UPJOHN, J., come to the conclusion that it is not right here to say that the words "notice of the condition" must be interpreted as meaning "express notice of the actual terms of the condition".

- In the course of his judgment, UPJOHN, J., referred to *County Laboratories, Ltd. v. J. Mindel, Ltd.* (4) ([1957] 1 All E.R. 806), a decision of HARMAN, J. That case concerned the sale, by the defendants, of a toilet article, a bottle of
- C "Brylcreem", which had been manufactured by the plaintiffs, and an attempt was made there to justify bringing proceedings against the defendants on the ground that they had sold the article at a price other than the list price. The ratio of the rejection by HARMAN, J., of the plaintiffs' claim in that action seems (as I follow it) to be that the defendants in that case did not and could not know that the bottle of "Brylcreem", having regard to the date of its
- D manufacture or supply, was covered by the price condition. In the present case, no such question of date has arisen. In those circumstances, *County Laboratories, Ltd. v. J. Mindel, Ltd.* (4) is not directly applicable to this case, and I prefer to say nothing further about it.

- Counsel for the defendants, by way of cross notice, also raised certain other questions. He intimated (but did not pursue the point) that the learned judge should not have drawn a certain inference of fact about these particular tyres; but that need not be further pursued, for reasons already indicated. Finally, counsel said that, after all, the defendants (as their name perhaps indicates) are not regular dealers in motor tyres. According to counsel, they have sold only about twelve such tyres in the course of a year, and are not likely to sell more or as many hereafter; moreover, this is a case in which the breach of the condition
- F was established by means, not of a genuine trading transaction, but of what is called a "trap order", and, therefore, no injunction ought to be granted on motion. As I ventured to point out, the plaintiffs' concern is not so much that of defeating the defendants as that of trying to maintain these price conditions fairly with their other customers. Here there was an advertisement announcing quite boldly and without qualification, a proposal to give a ten per cent. discount
- G on, among other things, motor tyres. It may be that this is a matter which is not likely now to be repeated by the defendants. Still, in my judgment, the plaintiffs having established (as I think they have) that the case is within s. 25 (1), they are properly entitled to an injunction on the usual terms on which injunctions are granted in the Chancery Division pending a trial. It may be that, after my
- H brethren have delivered their judgments, it will be proper to consider taking from the defendants some form of undertaking, instead of granting the punitive injunction. I think that, for the reasons which I have stated, the appeal should be allowed.

- ROMER, L.J.: I agree, and I have very little to add. It is, of course, quite true that as a general rule the equitable doctrines of constructive notice
- I are not to be extended to purely commercial transactions. So much was decided in *Manchester Trust v. Furness* (5) ([1895] 2 Q.B. 539) and *Greer v. Downs Supply Co.* (6) ([1927] 2 K.B. 28); but it appears to me that no question of constructive notice arises in the present case. Either the defendants had express notice of the relevant price restrictions relating to Goodyear tyres or they had no notice at all. The notice relied on by the plaintiffs is the circular which was issued in April, 1957, by the British Motor Trade Association, and to which LORD EVERSHED, M.R., has already referred. The defendants admit that that circular gave them notice that there was a restricted price for Goodyear tyres, and that,

indeed, is obvious from the terms of the circular itself. The question, however, is whether the notice which is contained in this circular, in addition to being an express notice, was sufficient for the purposes of s. 25 of the Restrictive Trade Practices Act, 1956. I shall not read the notice again, because my Lord has referred to it sufficiently in his judgment, but I will merely observe that, after a summary of the effect of s. 25 of the Act in para. 1, para. 2 gave express notice to the recipients of the circular, who were all traders in motor goods, that the manufacturers and concessionaires referred to in the schedule to the circular had imposed price restrictions on the goods specified in the schedule. Paragraph 4 informed the traders in perfectly clear terms that they might obtain details of the conditions as to the price prescribed for any of the specified products on application to the manufacturer or concessionaire concerned. The schedule gave the names of the manufacturers and concessionaires on whose behalf the circular was issued, their addresses and the products in respect of which conditions as to price had been prescribed.

The defendants say that that circular is insufficient for the purposes of s. 25, because s. 25 (1) in referring to "notice of the condition", means that nobody is to be affected by the section unless he had notice of the contents or terms of the price condition. The plaintiffs, on the other hand, say that the section only requires that notice should be given of the fact that there is a condition as to price, at all events when the notice contains directions as to how information as to the details can be obtained. That, in substance, is the issue between the parties, and it has to be decided in the light of the facts of this particular case. It appears to me that very considerable guidance is to be obtained on that question from cases which, I gather, were not brought to the attention of the learned judge, *UPJOHN, J.*, cases which my Lord has conveniently referred to as the "railway ticket cases". For my part, I have obtained special assistance in the matter from *Thompson v. London, Midland & Scottish Ry. Co.* (3) ([1930] 1 K.B. 41). I think that that case and its fellow cases tend to show quite clearly that in a case such as the present it is sufficient that notice should be given of the fact that there is a condition as to price if, as is the case before us, it is coupled with directions as to how the details of the conditions can be ascertained. It is true that the railway ticket cases were cases of express contract, but it does not seem to me that that fact detracts from the guidance which one can gather from them in relation to the present case, especially having regard to the fact that s. 25 (1) is, in substance, dealing with contracts and putting the ultimate trader with notice into the position of an original contractor. For my part, even without the assistance that is to be derived from the railway ticket cases, I should still, as a matter of mere construction of s. 25 (1) itself, have preferred the meaning which is attributed to it on behalf of the plaintiffs rather than that for which the defendants contend. It seems to me, as a matter of commercial common sense, that a trader should be regarded as having notice of a price condition provided that he is told that such a condition exists and is further told how he can get details of the condition. Accordingly, I agree with my Lord in thinking that this appeal should be allowed; and I have nothing to add to what he has said on the cross notice of appeal or on the relief which is appropriate to our decision.

ORMEROD, L.J.: I am of the same opinion. The short point in the case is whether the circular of April, 1957, issued by the British Motor Trade Association, gave to the defendants sufficient notice of the condition as to price restriction so as to bring them within s. 25 (1) of the Restrictive Trade Practices Act, 1956. It is not disputed that the circular was received by them and that it was given by the British Motor Trade Association in their capacity as agents for the plaintiffs. Therefore, the defendants concede that they did, in fact, receive such notice as was given by the circular. It follows that the defendants had notice of the fact that there was a condition that the plaintiffs' goods should not be

A resold or offered for resale at a price other than the appropriate price, or, to follow the words of the sub-section, they had notice that the goods had been "sold by a supplier subject to a condition as to the price at which those goods [might] be resold". If the question were being considered of the terms of a contract between the plaintiffs and the defendants, then there can be no doubt (and, indeed, it is admitted by counsel for the defendants) that the defendants

B would be bound by the terms, notice of which was set out in the circular. There is ample authority for that proposition, if such were needed, in what have been called in this case "the ticket cases", to which full reference has been made by my brethren.

It would seem, therefore, on the face of it, that, if the notice contained in the circular was sufficient to establish the terms of a contract between the parties,

C it should also be a sufficient notice under s. 25 (1) of the Act of 1956. The learned judge took a different view. He took the view that, as the statute restricted to some extent freedom of trading, it must be strictly construed and, in his view ([1958] 2 All E.R. at p. 329), the section required express notice of the actual terms and conditions sought to be enforced. In my judgment, this is too narrow a construction to put on the section. As LORD EVERSHED, M.R., has pointed out*, s. 25 (1) does not specify knowledge of the condition. The operative word is "notice". The object of the section is to put a person dealing with goods in the same position as he would have been if he had been a party to the contract with the original supplier, provided that he has notice of the condition in question. In my judgment, the notice which s. 25 (1) contemplates is notice of the fact of a condition as to the price at which the goods may be resold. It is unnecessary,

E I think, again to deal with the actual terms of the circular beyond saying that, in my judgment, it is clear (and it is not disputed by the defendants) that the circular does contain a notice of such condition. In those circumstances, it appears to me to follow that the defendants, when they purchased these goods for resale, did so with notice of the condition as to price restriction. I agree that the appeal should be allowed.

F *Defendants undertaking "not to resell or offer for resale any tyres, tubes or other goods manufactured by the plaintiffs and sold by them after Nov. 2, 1956†, at prices other than the respective prices prescribed by the plaintiffs for the resale of such goods: provided that this undertaking shall not extend (a) to the resale by the defendants of any goods acquired by the defendants otherwise than for the purpose of resale in the course of business or acquired by the defendants whether immediately or not from a*

G *person who has acquired such goods otherwise than for the purpose of resale in the course of business, or (b) to the resale of any goods pursuant to an order of any court or by way of execution or distress or to any goods acquired by the defendants whether immediately or not after such resale" accepted.*

Appeal allowed.

Solicitors: *Osmond, Bard & Westbrook* (for the plaintiffs); *Gregory, Rowcliffe & Co.*, agents for *Read, Roper & Read*, Manchester (for the defendants).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

* At p. 12, letter A, ante.

† The date on which Part 2 of the Act of 1956 (containing s. 25) came into force.

McNEILL AND ANOTHER v. JOHNSTONE.

[QUEEN'S BENCH DIVISION (Devlin, J.), June 26, 27, 1958.]

Damages—Measure of damages—Loss of earnings—Husband and wife in motor accident—Wife severely injured—Husband in United States Air Force and wife sent to air force hospital where medical treatment was free—Hospital distant from husband's station—Husband given a month's leave without pay primarily to enable him to visit wife in hospital—Whether husband entitled to recover loss of earnings for the month.

A collision between a car driven by the defendant and another car in which a United States Air Force officer and his wife were travelling was due to the defendant's negligence. The wife was seriously injured, and her husband sent her to an American air force hospital at Swindon, some 160 miles from Margate where they were living. The wife thus obtained free medical treatment and the hospital charges were very much less than they would have been in a civilian hospital at Margate. The wife was French and at the time of the accident, she had been married for only two months and had lived in England only for that time. The husband obtained a month's leave without pay from the air force in order, primarily, to stay in Swindon and visit the wife in hospital, but during the month he also travelled to and fro between Swindon and Margate in order to discharge business in Margate. In an action for damages against the defendant for negligent driving the husband claimed as special damage (among other items) the month's salary which he had lost and some expenses of going to and fro between Swindon and Margate, hotel bills and travelling expenses in connexion with the wife's treatment or final visits to the hospital.

Held: since, in view of the husband's right to the consortium of his wife, he could have recovered damages for loss of consortium for the period while she was having treatment (substantially free) in Swindon, if he had chosen to continue his work at Margate, he was entitled, as an alternative, to equivalent compensation for his loss of earnings while he was living at Swindon to be near to her; there would, therefore, be a fair apportionment of the aggregate of relevant items of special damage, so that the husband should recover what was, broadly, ascribable to expenses reasonably incurred solely because his wife was at Swindon, and in the circumstances he would be awarded one half of the aggregate of these items.

Dictum of DEVLIN, J., in *Behrens v. Bertram Mills Circus, Ltd.* ([1957] 1 All E.R. at p. 597) explained.

Kirkham v. Boughey ([1957] 3 All E.R. 153) considered.

[As to the measure of damages for personal injury, see 11 HALSBURY'S LAWS (3rd Edn.) 255, para. 427; and as regards loss of earnings or profits due to personal injury, see *ibid.*, p. 258, para. 430; for cases on the subject of damages for loss of earnings, see 17 DIGEST (Repl.) 102, 167, 168.]

As to actions by a husband for loss of consortium, see 19 HALSBURY'S LAWS (3rd Edn.) 820, para. 1341.]

Cases referred to:

- (1) *Kirkham v. Boughey*, [1957] 3 All E.R. 153; 3rd Digest Supp.
- (2) *Behrens v. Bertram Mills Circus, Ltd.*, [1957] 1 All E.R. 583; [1957] 2 Q.B. 1; 3rd Digest Supp.

Action.

In this action Royce Houston McNeill and Elayne Roussel McNeill, the plaintiffs (hereinafter referred to as "the husband" and "the wife"), claimed damages against William M. Johnstone, the defendant, for personal injuries arising out of the alleged negligent driving of a motor car by the defendant;

A the husband also claimed damages for the consequential loss and expense occasioned to him as a result of the defendant's negligence. On May 30, 1957, the defendant, while driving a motor car along Manston Road, Margate, collided with a car which the husband was driving and in which the wife was a passenger. As a result of the collision, the wife sustained serious injuries and the husband slight injuries; the husband's car was seriously damaged. At the time of the
B accident the husband was an officer in the United States Air Force and was living with his wife, who was French, and to whom he had been married for only two months, at Margate; the wife had lived in England only since her marriage. It being necessary for the wife to go into hospital because of her injuries, the husband chose to send her to a United States Air Force hospital at Swindon, which was about 160 miles from Margate, where she could receive free
C medical treatment, and where the hospital charges would be much less than in a nursing home or hospital at Margate. As a result of the wife being in hospital in Swindon, the husband, in effect, took a month's leave without pay so that he could spend time with her while she was there, but he also travelled to and fro, between Margate and Swindon, to discharge business in Margate.

The defendant paid a sum of money into court in satisfaction of the wife's
D claim. This was taken out of court by the wife. *DEVLIN, J.*, having held that the defendant was wholly to blame for the collision, awarded the husband £30 general damages, but the husband also claimed special damages in respect of damage done to his car and car hire charges and in respect of various expenses which he had incurred as a result of his wife's injuries, including hotel bills incurred by the husband and wife in connexion with her treatment, and the
E husband's expenses of travelling between Swindon and Margate. The husband also claimed the sum of £120, which was the amount which he would have earned during the month's leave without pay which he had taken in order to be with his wife at Swindon. The question arose whether the husband was entitled to recover this month's loss of earnings as special damage, and certain other items of special damage such as hotel bills and travelling expenses. The case is reported
F only on the question of these items of special damage.

Marven Everett, Q.C., and R. G. Dow for the plaintiffs.
R. E. Hopkins for the defendant.

DEVLIN, J.: I now come to another group of items of special damage claimed by the husband. They can all be grouped together because they are
G connected by a common principle. This group has given rise to some argument and some difficulty. The position after the accident was this. The husband could, if he had felt so disposed, have sent his wife to a hospital or nursing home near the place where he had his home, that is Margate in the County of Kent; no doubt there are nursing homes and hospitals there, and he could have presented to the defendant the nursing home's bill and the cost of the medical fees that the
H doctors charged for putting his wife right, and there would have been no answer to such a claim. He did not do that, not because he was deliberately considering alternatives, but because the other alternative that was presented to him was the obvious one, that is to say that the wife should go to an American air force hospital at Swindon, some considerable distance away, I think 160 miles, where she would receive free medical treatment and where the hospital charges would
I be very much less than they would be in any nursing home. If the wife had been sent to a nursing home at Margate the husband, without any cost to himself, could have visited her as often as the visiting hours permitted, and during such periods as, for example, the period when although she was still under the care of the hospital it was desirable that she should get out of its atmosphere for the week-end, he could have been with her, and he could have had her at home without any substantial charge. As it was she was away at Swindon. She was a French girl who had not been to England before the marriage and had only been in England with her husband some two months or so before the

accident. She spoke English, but she was naturally a stranger in a strange land and they had only been married for two months. Manifestly, in those circumstances a husband would desire to be with his wife as often and for as long as he possibly could, and I would readily accept what I think has been suggested that a husband's presence would contribute to the health of his wife, and that without that, if she had been left alone for a period of four weeks when she was in hospital, her recovery might very well have been retarded. In those circumstances, what the husband did was to take, in effect, as counsel for the defendant put it, a month's leave without pay; that is what it comes down to. He went to Swindon and spent some time in Swindon where he stayed cheaply at the bachelor officers' quarters; but he also went to and fro quite a substantial amount in order to return to his home in Margate to discharge business there, partly I think in connexion with the accident, but partly also other sorts of business. The result is that a variety of claims has come into existence which really all arise out of the fact that the wife instead of being in hospital near Margate was in hospital in Swindon.

The first of them is a claim for hospital charges which is admitted at £19, which is a great deal lower in all probability than it would have been for any comparable treatment that had to be paid for. There is a small item of claim for charges for bachelor quarters at Swindon, of £2, which is not disputed; and there is a claim for £24, which is put down as the cost of five visits to Swindon to see the wife, but as the evidence emerged it would be much more rightly described, I think, just as the cost of going to and fro. The husband, having taken his month's leave, did not spend all of it in Swindon, but went to and fro between Swindon and Margate and that £24 represents that. Then there is a claim for £14 6s. which is the cost of staying at a hotel for a week-end or a few days in the circumstances that I have already described, because it was thought desirable that the wife should have that time off and that change from the hospital, and two claims for £3 15s. and £5 1s. being two more hotel bills that arise out of visits that were made after the wife came out of hospital in order that she should go back to hospital to have a check-up and further treatment, which of course would not have arisen if she had been at a local hospital, at Margate; the husband and the wife had to spend one night at Swindon and because of the wife's leg paining her they broke the journey on the way back and spent the night in London. There is a claim for the cost of petrol arising from two visits to Swindon by the husband to see the wife, put at £6, and the expenses of journeys to Swindon when the wife went back there for a check-up and other treatment, getting out of plaster or something of that sort. Finally there is a claim for £120, the amount which the husband would have earned if he had not taken his month's leave.

All those items add up to just under £200, and I suppose that in all probability they represent a saving to the defendant—at any rate they are the alternative sum to what would otherwise have been charged to the defendant for nursing home fees and medical treatment. That, if I may so put it, is the practical way in which they are claimed; but one has to take account of the law and although counsel for the defendant is, I think, perfectly right to admit that in the circumstances of this case, with a husband and a young wife of this sort, the husband did what any husband might have been expected to do, counsel queries whether this sum is recoverable as a matter of law.

If one investigates the law on the subject and seeks to relate the recovery of this sum to some legal principle, it can only be that it is recoverable as damages for loss of consortium. Part of it may, of course, be recovered as visits to the hospital which contributed to the recovery of the wife; that is one ground which could be put, but it would be difficult to justify the whole on that ground. The real ground for recovery would have to be loss of consortium. It would have to be said that the husband was entitled to have the consortium of his wife—taking the consortium in the very widest sense of the companionship of his

A wife. He could, therefore, very easily because of the loss of companionship of his wife have had her treated in some hospital nearby in Margate. It could not have been objected, if he had done that, that he ought to have taken the cheapest possible way of treating his wife and sent her to Swindon—that he ought to have left her alone for months and not gone near her. The answer to that as a matter of law must, I think, be that his visits were necessary for her health or that he was entitled to have her companionship, or that if he had sent her to Swindon he would possibly have had a claim for general damages, but a claim nevertheless for loss of consortium during that period of one month. If he had a claim for that loss of consortium, it appears to me that he must have a claim for the alternative. Thus, if the husband could claim damages of £100 for loss of consortium during a month—I take £100 as a notional figure —and if, in order to preserve his consortium and therefore save the defendant paying him £100 the husband gave up his earnings during that month so as to be free to see his wife, he must be entitled to the earnings as an alternative.

That is in substance what I was trying to say (though I cannot have said it very clearly) in a passage* which DIPLOCK, J., quoted in *Kirkham v. Boughey* (1) ([1957] 3 All E.R. 153 at p. 157), which in turn has been cited to me in this case. Perhaps I would be wiser not to say anything more about it because it may be that, speaking extemporare, I may make matters worse; but that, as I say, is what I was seeking to say and I do not think that there is anything in what, in fact, DIPLOCK, J., decided which is inconsistent with that. DIPLOCK, J., decided the case before him on the basis which he refers to expressly (*ibid.*, at p. 156), that the claim for damages in that case was not based on loss of consortium. On that basis I should, if I may say so respectfully, have reached the same conclusion as DIPLOCK, J., reached on the facts of *Kirkham v. Boughey* (1).

Whether consortium can extend to companionship in the broadest sense of the word is, of course, a difficult point to decide. I considered in *Behrens v. Bertram Mills Circus, Ltd.* (2) ([1957] 1 All E.R. 583) that in the very exceptional circumstances of that case it did. Whether I should have considered it in this case to be equally applicable, I do not know. I think, if I may say so, that counsel for the defendant and his client who, of course, is an insurance company, have taken a very sensible view of the matter by not inviting me to go into the niceties of the law of consortium and deliver a careful and elaborate judgment on that point. The position is, I would say, that the insurance company has been saved a substantial sum by reason of the wife being treated at Swindon, and they are not disposed to say, therefore, that it would have been reasonable to expect that the husband would have remained away during the whole of that period. They are also prepared, I think, to concede—if they do not then I find this on the evidence—that, although the husband might have been able to see his wife from time to time at Swindon while still continuing with his duties, he would not have been able to see her for anything like the length of time that he did. That being so they are willing that I should deal with this group of claims in that broad way.

Counsel for the defendant says, and I think rightly, that that does not mean that the whole amount which totals nearly £200 should be conceded. If the husband had been taking his leave simply to be near his wife with that as his only object in view, it is obvious that he would have remained in Swindon all the time. In fact, he journeyed back and forth and the expense of the journeying is quite considerable; he says also that the reason for that was that he had business to discharge which, I suppose, he could only discharge in Margate; but that must mean that while the primary object of taking his leave at that time was to see his wife, it was not the sole object.

* *Behrens v. Bertram Mills Circus, Ltd.*, ([1957] 1 All E.R. at p. 597, letter D).

I think that I should take a broad view of these items. I shall leave undisturbed, as agreed, the £19* and the £2*, but with regard to the rest of the items which total roughly £180, I think that if they are divided in half and I give half to the husband it will represent a fair apportionment that can properly be ascribed to expenses reasonably incurred solely by reason of the fact that his wife was in Swindon and not in Margate.

Judgment for the plaintiff husband. B

Solicitors: *Kingsford, Dorman & Co.*, agents for *Girling, Wilson & Harvie*, Margate (for the plaintiffs); *Carpenters* (for the defendant).

[*Reported by WENDY SHOCKETT, Barrister-at-Law.*]

SCHLESINGER v. SCHLESINGER.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Sachs, J.), July 17, 1958.] D

Divorce—Alimony—Pendente lite—Decree of judicial separation—Revival of lis by appeal—Wife's right to pursue claim for alimony pendente lite pending appeal—Matrimonial Causes Act, 1950 (14 Geo. 6 c. 25), s. 20 (1).

A wife who has obtained a decree of judicial separation can, when notice of appeal has been given, apply for an order for alimony pendente lite, since the notice revives the "lis" (see p. 24, letters A to D, post). E

The wife filed a petition for judicial separation on the grounds of the husband's adultery and cruelty and included a prayer for alimony pending suit. On May 12, 1958, the wife obtained a decree of judicial separation. On the next day she gave notice of application for permanent alimony. On June 16 she gave notice of appeal to the Court of Appeal whereby she asked in effect that the decree of judicial separation be set aside, that there be a re-hearing of the suit, and that she be granted a decree of an identical nature on grounds additional to those on which the decree of May 12 was granted. On appeal by the wife from a decision of the registrar that she could no longer be heard to ask for alimony pendente lite, and adjourning the application for permanent alimony, F

Held: the wife was entitled to pursue her claim for alimony pendente lite since her notice of appeal had revived the "lis" in respect of which she had obtained the decree of May 12. G

Observations of BUCKNILL, L.J., in *Cavendish-Bentinck v. Cavendish-Bentinck* ([1948] 2 All E.R. at p. 286) applied.

M. v. M. ([1928] P. 123) distinguished. H

[As to allotment of alimony pendente lite after decree of judicial separation, see 12 HALSBURY'S LAWS (3rd Edn.) 349, para. 743, note (t); and for a case on the subject, see 27 DIGEST (Repl.) 497, 4389.

For the Matrimonial Causes Act, 1950, s. 19 (1), s. 20 (1), s. 22 (1), see 29 HALSBURY'S STATUTES (2nd Edn.) 407, 408, 409.] I

Cases referred to:

(1) *M. v. M.*, [1928] P. 123; 97 L.J.P. 101; 138 L.T. 648; 27 Digest (Repl.) 497, 4389.

(2) *Dunn v. Dunn*, (1888), 13 P.D. 91; 57 L.J.P. 58; 59 L.T. 385; 27 Digest (Repl.) 494, 4353.

* These items were respectively, the claim for hospital charges at Swindon and the claim for charges for bachelor quarters at Swindon, see p. 18, letter D, ante.

- A** (3) *Loveden v. Loveden*, (1810), 1 Phill. Ecc. 208; 161 E.R. 962.
 (4) *Jones v. Jones*, (1872), L.R. 2 P. & D. 333; 41 L.J.P. & M. 53; 26 L.T. 106; 27 Digest (Repl.) 268, 2150.
 (5) *Bevis v. Bevis*, [1935] P. 22; 103 L.J.P. 110; *revsd.* C.A., [1935] P. 86; 104 L.J.P. 41; 152 L.T. 545; 27 Digest (Repl.) 324, 2696.
B (6) *Cavendish-Bentinck v. Cavendish-Bentinck*, [1948] 2 All E.R. 285; [1949] P. 203; [1949] L.J.R. 272; 27 Digest (Repl.) 495, 4358.
 (7) *Mills v. Duckworth*, [1938] 1 All E.R. 318; Digest Supp.
 (8) *Lissenden v. Bosch (C.A.V.), Ltd.*, [1940] 1 All E.R. 425; [1940] A.C. 412; 109 L.J.K.B. 350; 162 L.T. 195; 33 B.W.C.C. 21; 2nd Digest Supp.

C **Summons adjourned into court.**

This was an appeal by the wife against an order of Mr. Registrar KINSLEY, dated June 16, 1958, refusing to allow her to proceed with her application for alimony pendente lite on the ground that since she had obtained a decree of judicial separation her claim could now relate only to permanent alimony.

The wife appeared in person.

D *Victor Williams and S. A. Stamler* for the husband.

Cur. adv. vult.

July 17. **SACHS, J.:** In December, 1953, the wife filed her petition for judicial separation on the grounds of her husband's adultery with two women, and on the grounds also of his cruelty. The petition contained a prayer for alimony pendente lite. A supplemental petition alleged adultery with two other women. During the period before the cause came on for trial various steps were taken in relation to the question of that alimony, but in fact no order was made. In the meanwhile the husband was paying to the wife £3,000 per annum free of tax, and £600 per annum free of tax in respect of each child (in addition to school fees, doctors' bills and so forth).

F On May 12, 1958, the cause came on for trial before DAVIES, J., and a decree for judicial separation was granted to the wife on the grounds of her husband's adultery with one woman named in the decree and two other women. On May 13 the wife, by her solicitors then on the record, issued a notice of application for an order for permanent alimony for herself and for the two children of the marriage. On June 2 the wife caused herself to be placed on the record as appearing in person. On the same day she sought an appointment for dealing with the question of alimony, and was granted June 16 as the date on which the matter would be heard. On June 16 she gave notice of appeal to the Court of Appeal in relation to the decree which she had herself obtained. The effect of that notice is to ask that the decree of May 12 be set aside, that there then be a re-hearing of the suit, and that a decree of an identical nature to that of May 12, be granted, but on further grounds in addition to that on which the court acted on that date.

H On the same day, June 16, the wife appeared before Mr. Registrar KINSLEY on the appointment which had been granted on June 2. There the wife, who since her solicitors ceased to be on the record, has clearly been by no means wholly deprived of assistance on legal points, asked the learned registrar to deal with the matter as on an application for alimony pendente lite. Her reason for so doing was that she was anxious lest her appeal should be prejudiced by any appearance on her part of seeking to take advantage of the decree of May 12 against which she was appealing. On this appointment on June 16, the learned registrar also had before him an application on behalf of the husband, who was seeking to combat the application for permanent alimony, asking that the matter be adjourned for him to file an affidavit as to his means.

It is not entirely clear whether the learned registrar treated the matter before him as being partly the application of May 13 and partly the original request for alimony pendente lite, or what other view he took of the exact technical position. In practice, however, he very rightly dealt with the matter as if both applications were at the same time before him. In parenthesis it is convenient here to mention that to facilitate any further proceedings after this hearing before me, whether these proceedings be by way of appeal or by way of the implementation of the order I am about to make, there has been in this court an amendment, at my suggestion, of the summons of May 13, so that it may cover in the alternative both alimony pendente lite and permanent alimony. After hearing the wife in person and the husband by his solicitor, the learned registrar came to the conclusion that the wife could no longer be heard to ask for alimony pendente lite and that the husband should have a reasonable opportunity to file an affidavit in relation to the claim for permanent alimony. In those circumstances he made an order which had, as I understand the position, the effect of ruling that there could be no further proceedings for alimony pendente lite and that the matter be adjourned until July 21, the husband being given until that date the opportunity of filing an appropriate affidavit on the footing that the wife was proceeding for permanent alimony.

The matter now comes before me on appeal with the object of obtaining a decision as to what basis the registrar should adopt on July 21 for any decisions he may then have to reach. It is not intended here to deal with and I do not propose to consider any of the merits of the matter in which the wife says, and the husband denies, that she is entitled to alimony very far in excess of what has hitherto been paid her by way of voluntary allowance. In effect a ruling is required whether on July 21 the wife's application should properly be treated as an application for alimony pendente lite, or alternatively as an application for permanent alimony. Consideration was also requested of the question whether by reason of the wife's notice of appeal to the Court of Appeal the position has been reached that she cannot in effect get either—apparently on the grounds that on the one hand she has ceased to be entitled to alimony pendente lite but on the other cannot proceed with an application for permanent maintenance save on the footing that she is so approbating the decree under appeal as to disentitle her to proceed therewith. It is convenient here to note a point of procedure which arose when it was indicated that by reason of the nature of the points of law in issue the appeal would be adjourned into open court for judgment. Counsel for the husband claimed that as of right he could be heard again when the matter was listed in open court; but I ruled that no such right existed. On the other hand, I told him that if he desired to add any additional argument on a point of law today, he should as a matter of courtesy have leave to put before the court any such submission as he might see fit.

I turn first to the question whether the wife can at this stage pursue any claim for alimony pendente lite, or as it is now more usually called alimony pending suit. On this point it was submitted on July 10 by counsel for the husband that no such claim can now be pursued because the wife has obtained a final decree of judicial separation and the position is governed by *M. v. M.* (1) ([1928] P. 123). As against this the wife in person argued that that decision does not apply because in the present case there is an appeal pending, whilst in *M. v. M.* (1) that was not the position. On this issue the learned registrar did not refer to any authority except *M. v. M.* (1). Indeed that was the only decision to which either party to this present appeal sought in the first instance to refer this court. In that case LORD MERRIVALE, P., discussed the nature of orders for alimony pendente lite made by the ecclesiastical courts, and indeed in 1928 there was no statutory provision for such alimony in cases of judicial separation, a matter which has

A been changed by the advent of s. 20 (1) of the Matrimonial Causes Act, 1950. In holding in the case before him that there could be no alimony pendente lite after the decree of judicial separation he had no need to consider, and there was not cited to him, authorities such as *Dunn v. Dunn* (2) ((1888), 13 P.D. 91), on the questions that arise when an appeal is pending. As Mrs. Schlesinger pointed out, in *M. v. M.* (1) there was no appeal pending and none apparently was contemplated.

B I now turn to the Matrimonial Causes Act, 1950. This Act by s. 19 (1), s. 20 (1) and s. 22 (1), gives the court specific statutory powers to make orders for alimony pendente lite on petitions for divorce, nullity of marriage, judicial separation and restitution of conjugal rights respectively. In each instance the phrasing used is identical: as regards petitions for judicial separation it reads:

C “On any petition for judicial separation, the court may make such interim orders for the payment of alimony to the wife as the court thinks just.”

Whilst these three sub-sections have been held to widen the court's discretion on quantum, neither they nor the Matrimonial Causes Rules deal with the question of the periods during which interim orders may run. Accordingly, it is proper for the court to look for guidance to the practice and procedure of the ecclesiastical courts before 1857 and the practice and procedure of this court as followed up to 1950 under provisions such as those of s. 190 (3) of the Supreme Court of Judicature (Consolidation) Act, 1925*, in relation to alimony pendente lite.

E There clearly being in the present case a *lis pendens* between the wife and her husband in the Court of Appeal, the first and most important question is whether that *lis* is the same as resulted in the decree granted by DAVIES, J., or whether on the contrary it is technically a fresh and independent *lis*—the original *lis* being treated as terminated by such order of the court of first instance as would be final if there were no appeal. As long ago as 1810 SIR JOHN NICHOLL in *Loveden v. Loveden* (3) ((1810), 1 Phill. Ecc. 208), dealt with the question of alimony where an appeal by the wife had been declared on the very day after sentence of separation, and held that the declaration suspended the sentence and ordered payment of alimony as from the date thereof, and not from the later date of the return of the inhibition. When so deciding he stated:

G “On principle I think it is due from the day of the appeal. The appeal suspends the sentence, but the suit still continues . . .”

H Similarly, after 1857 the position is that, as regards both suits for judicial separation and suits for divorce, the court has acted on the footing that on an appeal the old *lis* is regarded as continuing and the court can make, but is not bound to make, an order for alimony pendente lite. After there has been a judgment of the court which but for the appeal would be regarded as final any previous order in relation to alimony pendente lite lapses and the matter has to be considered afresh. For instances where these principles have been applied one can turn to *Jones v. Jones* (4) ((1872), L.R. 2 P. & D. 333), a suit for judicial separation, and *Dunn v. Dunn* (2), and *Bevis v. Bevis* (5) ([1935] P. 22 at p. 28), suits for divorce. I It is further to be noted that in *Cavendish-Bentinck v. Cavendish-Bentinck* (6) ([1948] 2 All E.R. 285), BUCKNILL, L.J. (*ibid.*, at p. 286) expressly speaks of a notice of appeal as having “revived the *lis*”—where that notice of appeal was given by the husband against an adverse finding in a divorce cause, and that cause had, so far as the court of first instance was concerned, been determined by a final judgment. The concept of the appellate court being concerned with a

revived lis (as opposed to some new and distinct lis) is indeed consistent with the decision there of the Court of Appeal that as from the moment of the notice of appeal it was the lower court and not the appellate court that had power to deal with alimony pendente lite. A

To my mind a notice of appeal "revives" the original lis, and it is the same lis which then continues albeit in an appellate court. It follows that it does not matter which party gives the notice of appeal, and, despite the fact that in the present cause the wife is by her appeal seeking to set aside the decree she has herself obtained, the lis now before the Court of Appeal is no different from that pursued in the court of first instance. Accordingly I accept the submission of Mrs. Schlesinger that the decision in *M. v. M.* (1) does not apply to the present case. Thus its effect is accurately stated in *LATEY ON DIVORCE* (14th Edn. at p. 233) in the words: B C

"... after a decree of judicial separation when there is no suit pending, the court cannot make an order for alimony pending suit."

It happens that the phraseology there used is closely parallel to that adopted as long ago as 1864 in *BROWNE'S TREATISE ON THE PRINCIPLES AND PRACTICE OF THE COURT FOR DIVORCE AND MATRIMONIAL CAUSES*, p. 78. It follows that the notice of application of May 13, having been amended to cover alimony pendente lite, the wife is entitled to pursue her claim for such an order when the matter comes once more before the registrar on July 21. On that occasion he will no doubt treat all affidavits that have been filed as available for deciding questions relating to that claim. D

There remain the points which have arisen whether the wife can at this stage pursue a claim for permanent alimony, and if so what effect that pursuit would have on her pending appeal against the order when she obtained a decree. As the wife has throughout her argument reiterated that it is an order for alimony pendente lite which she desires, and as I have not had the benefit of full argument on further matters, it does not seem necessary to deal with those points except to such extent as is proper in case the husband takes to appeal the issues now before me. Section 20 (2) of the Matrimonial Causes Act, 1950, reads: E F

"On any decree for judicial separation, the court may make such order for the payment of alimony to the wife as the court thinks just."

As the court has pronounced such a decree it is not impossible that on a proper interpretation of the above sub-section the wife on May 12 became and still remains technically entitled to pursue a claim for permanent alimony. Suffice it to say that if so her claim would in practice be alternative to that which she has for alimony pendente lite; that obviously so long as there is a lis pendens the court would in common sense be in most cases reluctant to make a permanent order; and that in the present case the wife is at this stage specifically not asking for a permanent order. Incidentally, on any question as regards amount the husband financially is in a better position where the application is for alimony pending suit than he is in a case where it is for permanent alimony because normally the practice of this division is to order payment of lesser sums pending suit than when the matter comes to be dealt with on a permanent footing. G H

Next it seems in fairness to the wife right to mention the point argued as to the effect of making a claim for permanent maintenance. The wife, as I have mentioned, fears that if she continued to make such a claim and took any benefit under it she might find herself debarred from pursuing her main appeal. At one stage counsel for the husband did indeed submit that the wife by asking for such an order would approbate the decree granted by *DAVIES, J.*, and debar herself from proceeding with that appeal. Later, however, he resiled from this submission and on behalf of his client argued that the wife's proper course here I

A was to proceed with her application for permanent alimony and that she could safely do this without affecting her right to pursue the main appeal. The principle on which this question falls to be discussed is appropriately indexed in MEGARRY'S MISCELLANY AT LAW (at p. 256) under the heading of "Blowing Hotter", an art in which the litigants in this case do not seem wholly unversed. That phrase is derived from the judgment of GREER, L.J., in *Mills v. Duckworth* (7) ([1938] 1 All E.R. 318 at p. 321). There the attitude of an appellant who desired to obtain an upward revision of the amount of damages awarded was said to be that of a man asserting: "I am not going to blow hot and cold. I am going to blow hotter". Having regard to the decision in that case and to the speech of LORD ATKIN in *Lissenden v. Bosch (C.A.V.), Ltd.* (8) ([1940] 1 All E.R. 425 at p. 436), I am inclined to the view that in this particular instance the wife in law as well as in fact comes within the category of those who blow with increasing heat. In all the circumstances this issue is primarily mentioned so as to record the attitude adopted by counsel for the husband in case that might become relevant to some future turn in the somewhat unpredictable course of this litigation.

In the result the wife's appeal is allowed and the matter will proceed on July 21 on the footing previously indicated. In view of the probability that in due course the lis will end with the wife in possession of a decree of judicial separation the sooner any necessary investigation of the husband's means takes place the better for all concerned.

Order accordingly.

Solicitors: *G. & G. Keith* (for the husband).

[*Reported by A. T. HOOLAHAN, Esq., Barrister-at-Law.*]

F WESTMINSTER CITY COUNCIL v. UNIVERSITY OF LONDON KING'S COLLEGE.

[CHANCERY DIVISION (Roxburgh, J.), July 2, 3, 16, 1958.]

Rates—Limitation of rates chargeable—Hereditament occupied for the purposes of a non-profit making organisation—Notice terminating the limitation of rates chargeable—When notice may be given—Notice given before expiration of first year of new valuation list but after rate for second year had been made—Rating and Valuation (Miscellaneous Provisions) Act, 1955 (4 & 5 Eliz. 2 c. 9), s. 8 (2), (3).

The ratepayers were the occupiers of premises to which s. 8 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, applied. It was the statutory duty of the rating authority to initiate before Feb. 1, 1957 (i.e., during the currency of the first year of the new valuation list) the making of a rate for the second rating year (Apr. 1, 1957, to Mar. 31, 1958). A resolution approving the rate for 1957-58 was passed by the rating authority on Mar. 14, 1957, and the rate was deemed to be made on that date. In writing out the rate books, which had to be done before Apr. 1, the rating authority's officers had to give effect therein to the reduction allowed by s. 8 (2) (b)* of the Act of 1955. On Mar. 28, 1957, the rating authority served on the ratepayers a notice under s. 8 (3)* of the Act of 1955 that the limitation imposed by s. 8 (2) (b) on the amount of rates chargeable in respect of the ratepayers' premises would cease to apply as from the end of the year ending Mar. 31, 1960. The ratepayers disputed the validity of the

* The terms of s. 8 (2) and s. 8 (3) are printed at p. 26, letter I, to p. 27, letter E, post.

notice on the ground that it was premature in that s. 8 (3) did not operate until after the expiration of the first year of the new valuation list, which ended on Mar. 31, 1957.

Held: the notice was valid because the statutory process of making and levying a rate began not later than Feb. 1, 1957, with the consequence that when the notice was given s. 8 (2) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, was having effect in relation to the hereditament and the condition in s. 8 (3), "where para. (b) of the last preceding sub-section has effect", was satisfied, so that the notice was not prematurely given.

Dictum of WYNN-PARRY, J., in *St. Pancras B.C. v. University of London* ([1957] 2 All E.R. at p. 396) not followed.

[For the Rating and Valuation (Miscellaneous Provisions) Act, 1955, s. 8, see 35 HALSBURY'S STATUTES (2nd Edn.) 394.]

For the Rating and Valuation Act, 1925, s. 6 (1) and s. 9 (2) (d) and (e), see 20 HALSBURY'S STATUTES (2nd Edn.) 112, 114; and for the Local Government Act, 1948, s. 54, s. 120 and s. 121 (4), see *ibid.*, 256, 310, 312.]

Case referred to:

(1) *St. Pancras B.C. v. University of London*, [1957] 2 All E.R. 395; *affd.*, C.A., [1957] 3 All E.R. 673; 3rd Digest Supp.

Adjourned Summons.

The plaintiffs, the Westminster City Council, as rating authority for the district, applied to the court by originating summons for the determination under R.S.C., Ord. 54A, of the question whether, on the true construction of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, and in the events which had happened, a notice, dated Mar. 27, 1957, and served on the defendants on Mar. 28, 1957, in respect of certain properties forming part of the hereditaments known as King's College, Strand, in the City of Westminster, was valid and had the effect under s. 8 (3) of the Act of withdrawing from the defendants as from the end of the year ending Mar. 31, 1960, the limitation on the defendants' liability for rates in respect of the premises conferred by s. 8 (2) of the Act.

J. A. Wolfe for the plaintiffs, the rating authority.

W. B. Harris for the defendants, the ratepayers.

Cour. adv. vult.

July 16. **ROXBURGH, J.**, read the following judgment: The plaintiffs are the rating authority for the parish of the City of Westminster. The defendants have been since a date long before Apr. 1, 1956, and still are, the owners and occupiers of the premises known as King's College, Strand, in the parish of the said city. Most parts of such premises (such parts being hereinafter called "the s. 8 premises") are premises to which s. 8 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955 (hereinafter called "the Act of 1955") applies. Section 8 (2) of the Act of 1955 provides:

"For the purposes of the making and levying of rates in a rating area, for the year beginning with the date of the coming into force of the first new valuation list for that area (in this section referred to as 'the first year of the new list'), and for any subsequent year, the amount of rates chargeable in respect of a hereditament to which this section applies shall, subject to the following provisions of this section, be limited as follows, that is to say— (a) for the first year of the new list, the amount so chargeable shall not exceed the total amount of rates (including any special rates) which were charged in respect of the hereditament for the last year before the new list came into force; (b) if, by virtue of the preceding paragraph, the amount of

A rates chargeable in respect of the hereditament is less than it would have
 B been apart from that paragraph, the proportion by which it is thereby
 required to be reduced shall apply to any subsequent year during which
 the hereditament continues to be one to which this section applies, and
 accordingly the amount of rates chargeable in respect of the hereditament
 for any such year shall be reduced by that proportion: Provided that this
 sub-section shall have effect subject to the provisions of Sch. 5 to this Act
 in cases falling within that schedule."

Section 8 (3) provides:

C "Where para. (b) of the last preceding sub-section has effect in the case of
 a hereditament, the rating authority may at any time give notice to the
 occupiers of the hereditament that, as from the end of a year specified in
 the notice, being a year ending not less than thirty-six months after the
 date on which the notice is given, the limitation imposed by virtue of that
 paragraph shall either cease to apply to the hereditament or shall be modified
 as mentioned in the notice; and where such a notice is given—(a) if the
 D notice states that the limitation shall cease to apply, para. (b) of the last
 preceding sub-section shall not apply to the hereditament as respects any
 year beginning after the end of the year specified in the notice; (b) if the
 notice states that the limitation shall be modified, then, subject to the
 operation of any further notice given under this sub-section, the said
 para. (b) shall have effect in relation to the hereditament as respects any
 E such year with the substitution, for the proportion mentioned in that
 paragraph, of such lesser proportion as may be specified in the notice."

Section 8 (4) and (5) are as follows:

F "(4) The rating authority for a rating area shall have power to reduce or
 remit the payment of any rate charged in respect of a hereditament to
 which this section applies for the first year of the new list or any subsequent
 year, including power further to reduce or to remit the payment of any
 rate in the case of which the amount chargeable is required to be reduced
 by virtue of the preceding provisions of this section.

G "(5) The preceding provisions of this section, and the provisions of Sch. 5
 to this Act, shall have effect, with the necessary modifications, in relation to
 rates charged for a rate period forming part of the first year of the new list,
 or of any subsequent year, as they have effect in relation to rates charged
 for the first year of the new list or for any subsequent year, as the case may
 be."

H By notice dated Mar. 27, 1957, and served by post on the defendants on Mar.
 28, 1957, the plaintiffs gave notice pursuant to s. 8 (3) of the Act of 1955 that as
 from the end of the year ending Mar. 31, 1960, the limitation imposed by virtue
 of s. 8 (2) (b) of the Act on the amount of rates chargeable in respect of the
 hereditaments set out in the schedule thereto (being the whole of the s. 8 premises)
 should cease to apply. The defendants dispute the validity of the said notice on
 I the ground that it was served before the end of the first year of the new list
 which ended on Mar. 31, 1957, and the plaintiffs submit to the court the question
 whether this objection is well founded. If the notice was premature, the def-
 endants will obtain the benefit of the limitation for a further rating year.

Before approaching the question of construction involved, I must outline the
 statutory machinery for the making and levying of a rate. This is a complicated
 task which I could never have undertaken without the great assistance given to
 me by counsel and those instructing them. The new valuation list provided for

by the Act of 1955 was duly completed in regard to the parish of the City of Westminster, and the first year of the new list (as defined in s. 8 (2) of the Act) commenced on Apr. 1, 1956. During the currency of the first year of the new list, that is, before Feb. 1, 1957, it was the statutory duty of the plaintiffs to initiate the making of a rate for the second rating year which was to run from Apr. 1, 1957, to Mar. 31, 1958. Section 9 (2) (d) of the Rating and Valuation Act, 1925 (hereinafter called "the Act of 1925"), as modified and applied by s. 120 (1) and (2) and s. 121 (4) of the Local Government Act, 1948 (hereinafter called "the Act of 1948"), provides that every rating authority shall before Feb. 1 in each year transmit to authorities having power to issue a precept to that rating authority an estimate of the amount, calculated in the prescribed manner, which would be produced in the next financial year by a rate of a penny in the pound levied in the rating area.

The prescribed manner for making such an estimate is to be extracted from the Product of Rates and Precepts (London) Rules, 1948 (S.I. 1948 No. 883), and these rules involve taking into account any reductions in the amount of rates chargeable by reason of s. 8 (2) (b) of the Act of 1955 in the second rating year. Before Mar. 11, 1957 (still during the first rating year), the precepting authorities had to inform the plaintiffs of the amount in the pound to be levied under their precepts: see s. 9 (2) (e) of the Act of 1925. The plaintiffs then proceeded to take steps which culminated in the following resolution passed at a meeting held on Mar. 14, 1957, whereby it was ordered:

"That, for the purpose of meeting the liabilities falling to be discharged by the council during the period commencing on Apr. 1, 1957, and ending on Mar. 31, 1958, a general rate of 14s. 2d. in the pound be made and approved for the said period; and that the said general rate be levied, subject to the provisions of s. 8 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, in accordance with the particulars contained in the rate book and valuation list in force for the parish of the City of Westminster during the said period; and that the said general rate be payable in two instalments, each of 7s. 1d. in the pound, on Apr. 1, 1957, and on Oct. 1, 1957, respectively, with additional items of 7d. in the pound over the area of Montpelier Square (payable in instalments of 4d. in the pound on Apr. 1, 1957, and 3d. in the pound on Oct. 1, 1957), and 2d. in the pound over the area of Hanover Square (payable in instalments of 1d. each on Apr. 1 and Oct. 1, 1957)."

Section 54 (1) of the Act of 1948 provides that the rate shall be deemed to be made on the date on which it is approved by the rating authority, and, accordingly, the purpose of the "making" of the rate for the second rating year was fulfilled before the notice was given. Within seven days thereafter the rate had to be published (see s. 6 (1)* of the Act of 1925) and before Apr. 1 officers of the plaintiffs had to write out the rate books, giving effect therein to the reduction allowed by s. 8 (2) (b) of the Act of 1955: see Rate Accounts (Metropolitan Borough Councils) Regulations, 1953 (S.I. 1953 No. 480), reg. 5. Then after Apr. 1 came demand notes, collection and recovery.

Section 8 of the Act of 1955 has already been discussed, and in part construed, by WYNN-PARRY, J., and the Court of Appeal in *St. Pancras B.C. v. University of London* (1) ([1957] 2 All E.R. 395; [1957] 3 All E.R. 673). In that case the notice was served before the beginning of the first year of the new list, that is, on Mar. 21, 1956, and both courts decided that it was premature. That decision, of course, binds me, but the question is to what extent, if at all, I am bound by the ratio decidendi adopted by WYNN-PARRY, J., because, if binding,

* Section 6 of the Act of 1925 was extended to London by s. 54 (2) of the Act of 1948.

A it would cover the present case. WYNN-PARRY, J., said ([1957] 2 All E.R. at p. 396): "... but clearly the provisions of para. (b) [of s. 8 (2)] cannot come into operation until the expiration of the first year" (that is, Mar. 31, 1957), and, accordingly, he held that no notice could be given before then. He must have proceeded on the basis that the words "has effect"* mean that the rates are due and presently payable. On that basis, and on that basis alone, could it be
 B clear that the provision of para. (b) could not come into operation until Apr. 1, 1957, and on that basis, this case would be covered as well as that. That case, however, took a materially different course in the Court of Appeal, although the actual decision was affirmed. The argument of counsel for the rating authority is stated in the judgment of LORD EVERSHED, M.R. ([1957] 3 All E.R. at p. 674):

C "The real force, I think, of the argument of counsel for the rating authority lay in the use of the three words 'at any time'*; for, he submitted, 'at any time' means 'at any time'. This Act came into operation on July 27, 1955. His submission is that at any time after the Act was part of the law of the land such a notice may be given . . ."

D The Master of the Rolls rejected that submission, holding that the words "has effect" meant "has practical effect", and this conclusion forms no obstacle to the argument of counsel for the plaintiffs here. No doubt, the Master of the Rolls did show an inclination towards the ratio decidendi of WYNN-PARRY, J., but the powerful argument of counsel for the plaintiffs in the present case would have
 E been out of place in that case, and the Master of the Rolls expressly left the way open for him by confining his decision to a notice given before Apr. 1, 1956. ROMER and ORMEROD, L.JJ., agreed. Therefore I am free to re-examine the section in the light of counsels' arguments.

First of all (argues counsel for the plaintiffs), I must attend to the opening words of s. 8 (2), "For the purposes of the making and levying of rates", which
 F govern the whole sub-section. With this I agree. What, then, constitutes the "making and levying of rates"? Rates are "made" when the rating authority passes the appropriate resolution, and this, as has already emerged, is required by statute to be done before the beginning of the rating year in question. But, in my judgment, the process of "making" necessarily starts much earlier, in
 G fact not later than Feb. 1, when the rating authority has to comply with its statutory duty of estimating the product of a penny in the pound rate in the next rating year. The word "levy" is to be found in one of the earliest rating Acts, the Poor Relief Act, 1601, and is there used in a very narrow sense. But the word is frequently used in the multifarious rating Acts, and often bears a wide meaning. In my judgment, the phrase "the making and levying of rates" is
 H here used to describe the whole statutory process of raising money by means of a rate from start to finish. This interpretation fits well with para. (a) of s. 8 (2). Although the first year of the new list began on Apr. 1, 1956, the process of making a rate for that rating year had begun before Feb. 1, 1956, and part of the process of levying had begun before the end of March. Accordingly, para. (a) of s. 8 (2)
 I of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, provides that the amount "chargeable" for the rating year 1956-57 shall not exceed the amount "charged" for the year 1955-56. I regard the contrast between "charged" and "chargeable" as significant, and in this connexion would refer to s. 8 (4). The process of making a rate for the second year of the new list was bound to begin before Feb. 1, 1957, because, in making an estimate of the amount which a rate of one penny in the pound would produce, the rating

* In s. 8 (3) of the Act of 1955.

authority was bound to take into account the hereditaments in respect of which the amount of rates "chargeable" (not "charged") was statutorily reduced by virtue of para. (b) of s. 8 (2). Therefore, even as early as Feb. 1, 1957, para. (b) "had effect", and, in my judgment, no notice given after that date, and, a fortiori, no notice given after Mar. 14, 1957, when the rate for 1957-58 was actually "made", was premature.

Counsel for the defendants argued (adopting the ratio decidendi of *WYNN-PARRY, J.*, to which the Court of Appeal had shown an inclination) that "has effect" means "has effect by creating a present liability to pay", which did not happen until Apr. 1, 1957. This argument seems to me to ignore the opening words of s. 8 (2), which are incapable of being confined to the present obligation of a ratepayer to pay, and, indeed, point to a process, and not to a liability at all. If, before Apr. 1, 1957, the rating authority finds King's College still in occupation, having had the benefit of the statutory reduction in the first year still current, the rating authority is bound to apply para. (b) of s. 8 (2) for the purpose of making and levying a rate for the second year beginning on Apr. 1, 1957. Accordingly, before Apr. 1, 1957, the paragraph has had "effect". Only the reduced amount is "chargeable" so long as s. 8 (1) remains applicable, and, accordingly, para. (b) has no effect on the amount "charged", that is, payable on or after Apr. 1, 1957. Accordingly, the notice served on Mar. 28, 1957, was, in my judgment, not premature.

Order accordingly.

Solicitors: *Allen & Son* (for the plaintiffs); *Slaughter & May* (for the defendants).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

Ex parte RIGBY.

[QUEEN'S BENCH DIVISION (Devlin and Ashworth, JJ.), July 8, 1958.]

Magistrates—Summary trial—Offence triable summarily or on indictment—Whether application for summary trial by prosecutor may be implied—Magistrates' Courts Act, 1952 (15 & 16 Geo. 6 & 1 Eliz. 2 c. 55), s. 18 (1), (2).

An application by a prosecutor under s. 18 (1)* of the Magistrates' Courts Act, 1952, for the summary trial of an offence which is triable on indictment or summarily, may be made either expressly or by conduct.

James v. Bowkett ([1952] 2 All E.R. 320) followed.

R. pleaded guilty at a magistrates' court to taking and driving away a motor vehicle without the owner's consent contrary to s. 28 of the Road Traffic Act, 1930, an offence which was triable summarily or on indictment. After a police officer had given evidence, R.'s counsel made a plea in mitigation and the magistrate passed sentence on R. At no time during the

* Section 18 of the Magistrates' Courts Act, 1952, provides: "(1) Where an information charges any person with an offence that is by virtue of any enactment both an indictable offence and a summary offence, the magistrates' court dealing with the information shall . . . proceed as if the offence were not a summary offence, unless the court, having jurisdiction to try the information summarily, determines on the application of the prosecutor to do so.

"(2) An application under the preceding sub-section shall be made before any evidence is called . . ."

A hearing did the prosecution formally apply for a summary trial. R. sought leave to apply for an order of certiorari to quash the order sentencing him on the ground that the magistrates' court had no jurisdiction to try the case summarily as the prosecution had not applied for a summary trial in accordance with s. 18 (1), (2)* of the Magistrates' Courts Act, 1952.

B **Held:** the prosecution, by their conduct in proceeding with the case, had made an application for a summary trial within s. 18 (1), (2); leave to apply for certiorari would therefore be refused.

[For the Magistrates' Courts Act, 1952, s. 18, see 32 HALSBURY'S STATUTES (2nd Edn.) 437.]

Case referred to:

C (1) *James v. Bowkett*, [1952] 2 All E.R. 320; 116 J.P. 445; 3rd Digest Supp.

Application for leave to move for certiorari.

This was an ex parte application by Albert Edward Rigby, the applicant, for an order of certiorari to bring up and quash an order sentencing the applicant to three months' imprisonment and disqualifying him for one year from holding a driving licence for an offence under s. 28 of the Road Traffic Act, 1930; the order was made at the magistrates' court at Bow Street on June 18, 1958, by SIR LAWRENCE DUNNE, M.C., the chief metropolitan magistrate. The ground of the application was that the magistrates' court had no jurisdiction to try the information charging the offence against the applicant or to impose the sentence contained in the order. The following facts were in evidence. On May 31, 1958, the applicant was charged at the magistrates' court at Bow Street with taking and driving away a motor vehicle without the owner's consent or other lawful authority, contrary to s. 28 of the Road Traffic Act, 1930; by s. 28 the offence was triable either on indictment or summarily. The applicant was remanded on bail to appear at Bow Street court on June 18, 1958; he was not told that the offence was triable either summarily or on indictment and the prosecutor did not expressly apply to the court for a summary trial under s. 18 (1)* of the Magistrates' Courts Act, 1952. On June 18 the applicant appeared again at Bow Street court and pleaded guilty to the charge; evidence was then given by a police officer, and, after counsel for the applicant had made a plea in mitigation of sentence, the chief magistrate sentenced the applicant. At no time during the hearing of the case on June 18 did the prosecutor expressly apply to the court for the case to be tried summarily under s. 18 (1)* of the Act of 1952, nor was the applicant asked whether he wished the case to be tried summarily or on indictment.

H *I. McCulloch* for the applicant: *James v. Bowkett* (1) ([1952] 2 All E.R. 320) is distinguishable. The enactment relevant to that case was s. 28 (1) of the Criminal Justice Act, 1948†, whose wording was different to that of s. 18 (1) of the Magistrates' Courts Act, 1952‡, which is the enactment relevant to this case. The latter enactment is mandatory, in that the court must proceed as if the offence were not a summary offence unless it determines on the application of the prosecutor to try the case summarily. The court is not absolved from compliance

* See footnote ante, p. 30.

I † Section 28 (1) of the Criminal Justice Act, 1948, which was repealed by the Magistrates' Courts Act, 1952, Sch. 6, provided:—"Subject to the provisions of this section, where a person who is not less than fourteen years of age is charged before a court of summary jurisdiction with an offence which, by virtue of any enactment, is punishable either on summary conviction or on conviction on indictment, then if application in that behalf is made by the prosecutor before the charge has been entered upon, the court may then determine to try the case summarily; but if the court does not so determine it shall proceed to hear the case as if the offence were punishable on conviction on indictment only."

‡ For the terms of sub-s. (1) of s. 18 of the Act of 1952, see footnote p. 30, ante.

with the enactment by any knowledge that the accused may have had of its requirements; see per DONOVAN, J., in *R. v. Salisbury and Amesbury JJ., Ex parte Greatbatch* ([1954] 2 All E.R. 326 at p. 329, letter C). The dictum of LORD GODDARD, C.J., in *James v. Bowkett* (1) ([1952] 2 All E.R. at p. 321, letter H) that it would be better if the clerk asked the prosecutor whether he was applying for summary trial also showed that the procedural requirements of the Act of 1952 should be observed. A
B

ASHWORTH, J.: In view of s. 18 (2) of the Magistrates' Courts Act, 1952*, the prosecutor showed by calling evidence that he had impliedly made application under s. 18 (1), within the principle of *James v. Bowkett* (1).

DEVLIN, J., giving the judgment of the court: The Criminal Justice Act, 1948, s. 28 (1)†, said "if application in that behalf is made by the prosecutor before the charge has been entered upon." Section 18 (2) of the Magistrates' Courts Act, 1952*, provides—"An application under the preceding sub-section shall be made before any evidence is called . . .". In essence the wording seems to me to be the same. The whole question is what amounts to the making of an application? C
D

In *James v. Bowkett* (1) ([1952] 2 All E.R. 320), where it was necessary for both sides either to apply for or to consent to a summary trial, it was held in effect that the express assent of the defence was sufficient and the conduct of the prosecutor was sufficient. That case turned on the question of what amounted to the making of an application. Here the question is what amounts to a proper application when it has to be made only by one side, the prosecution. It must follow from *James v. Bowkett* (1) that the same rule applies. The application can be made either expressly or by conduct which inevitably leads to the inference that it is being made. The essential point is the same in both cases. E

The court will dismiss this application and will refuse leave to apply for an order of certiorari.

Application dismissed.

Solicitors: *Avery & Wolverson* (for the applicant).

[Reported by WENDY SHOCKETT, Barrister-at-Law.]

* See footnote ante, p. 30.

† See footnote † ante, p. 31.

A WALSH v. HOLST & CO, LTD., AND OTHERS.

[COURT OF APPEAL (Hodson, Morris and Sellers, L.J.J.), June 4, 5, 6, July 1, 1958.]

Negligence—Res ipsa loquitur—Highway—Adjacent building being re-constructed by contractors for occupiers—Unexplained fall of brick on passer-by—Negligence disproved.

B A brick, falling from a large four-storey building adjoining the highway, struck and injured the plaintiff, who was on the opposite side of the highway. Contractors, employed by the occupiers of the building, were carrying out a conversion of the building which involved enlarging window openings and dislodging bricks. The apertures were subsequently faced with brick by a sub-contractor for the windows to be inserted. Precautions were taken by the contractors to prevent bricks falling into the highway, and it was inexplicable how the brick came to fall into the highway. In an action by the plaintiff against the contractors, the sub-contractor and the occupiers for damages for negligence it was found that negligence had not been established against any defendant. On appeal as against the contractors and the occupiers,

D **Held:** though as against the contractors and the occupiers *res ipsa loquitur*, yet (MORRIS, L.J., dissenting) the defendants had satisfied the court that they had not been negligent, and therefore the action failed.

Dicta in *Woods v. Duncan* ([1946] A.C. at pp. 425, 439), and *Moore v. R. Fox & Sons* ([1956] 1 All E.R. 182) applied.

E Appeal dismissed.

[**Editorial Note.** No question arose of acts of casual or collateral negligence for which, when the fault of a contractor or sub-contractor, neither the occupier nor the main contractor respectively would be liable; nor did the existence of the sub-contractor produce uncertainty as to the identity of the persons against whom the plaintiff might be entitled to claim (see p. 36, letter I, post).

F Inexplicable accidents may sometimes be caused by the malicious act of some person unknown; an illustration of such a defence, resting on a breach in the chain of causation, is afforded by the decision in *A. Prosser & Son, Ltd. v. Levy* ([1955] 3 All E.R. 577), where, however, the burden of proving it was not discharged.

G As to *res ipsa loquitur*, see 23 HALSBURY'S LAWS (2nd Edn.) 671-675, paras. 956-958; and for cases on the subject, see 36 DIGEST (Repl.) 143-149, 753-780.]

Cases referred to:

- (1) *Byrne v. Boadle*, (1863), 2 H. & C. 722; 33 L.J.Ex. 13; 9 L.T. 450; 159 E.R. 299; 36 Digest (Repl.) 73, 387.
- (2) *Penny v. Wimbledon Urban Council*, [1899], as reported in 2 Q.B. 72; 68 L.J.Q.B. 704; 80 L.T. 615; 34 Digest 161, 1260.
- H (3) *Maxwell v. British Thomson-Houston Co., Ltd., Blackwell & Co., Third Parties*, (1902), 18 T.L.R. 278; 34 Digest 163, 1272.
- (4) *Moore v. Fox (R.) & Sons*, [1956] 1 All E.R. 182; [1956] 1 Q.B. 597; 3rd Digest Supp.
- (5) *Mint v. Good*, [1950] 2 All E.R. 1159; 31 Digest (Repl.) 384, 5110.
- I (6) *Tarry v. Ashton*, (1876), 1 Q.B.D. 314; 45 L.J.Q.B. 260; 34 L.T. 97; 40 J.P. 439; 34 Digest 163, 1274.
- (7) *Cassidy v. Ministry of Health*, [1951] 1 All E.R. 574; [1951] 2 K.B. 343; 2nd Digest Supp.
- (8) *Scott v. London Dock Co.*, (1865), 3 H. & C. 596; 34 L.J.Ex. 220; 13 L.T. 148; 159 E.R. 665; 36 Digest (Repl.) 145, 772.
- (9) *Barkey v. South Wales Transport Co., Ltd.*, [1948] 2 All E.R. 460; *revid.* H.L., [1950] 1 All E.R. 392; [1950] A.C. 185; 114 J.P. 172; 36 Digest (Repl.) 144, 764.

- (10) *Pickard v. Smith*, (1861), 10 C.B.N.S. 470; 4 L.T. 470; 142 E.R. 535; A 36 Digest (Repl.) 72, 384.
- (11) *Woods v. Duncan, Duncan v. Hambrook, Duncan v. Cammell Laird & Co., Ltd.*, [1946] 1 All E.R. 420 n.; [1946] A.C. 401; [1947] L.J.R. 120; 174 L.T. 286; 36 Digest (Repl.) 52, 286.

Appeal.

This was an appeal by the plaintiff, John Walsh, against the decision of GORMAN, J., dismissing his action for damages for negligence against Holst & Co., Ltd., L. Crossman, and the North Western Electricity Board, the first, second and third defendants, who were respectively the contractors at work on a building, a sub-contractor employed by the contractors, and the occupiers of the building who were employing the contractors.

In the early afternoon of Sept. 16, 1956, the plaintiff was walking along the pavement of Back Darwen Street, Blackburn, which had a carriageway about fifteen feet wide. When he was opposite a building, on the other side of the street, of which the third defendants were the occupiers, he was seen lying on the pavement, having received a wound on the right forehead and on his nose. No one saw how this came about, and the plaintiff himself did not know what had happened to him, but half a brick was found in the roadway a few feet from the plaintiff. There was no evidence that the brick had any skin or blood on it or any other mark of a contact with the plaintiff's head, but GORMAN, J., found that it had hit the plaintiff on the head and so caused his injuries. The pavements on both sides of the road were narrow and that on the opposite side of the road was enclosed by upright sheeting at the base of the scaffolding. At certain times on some days when a certain football team were playing, the street, which was a side street, might be traversed by some thousands of rovers: but at such times building operations would not be taking place. The building from which the trial judge found the brick had come was a large four-storey former generating station which was being turned into offices. The sub-contractor was employed by the contractors to face window apertures in the building with brick, which apertures had been enlarged by the contractors to fit them for new windows. At the time of the plaintiff's accident, both the contractors and the sub-contractor were working on the building, but the contractors' men had not been engaged on the apertures that day, and the only man then working on the face of the building was one Lord, a bricksetter employed by the sub-contractor. GORMAN, J., accepted Mr. Lord's evidence that no brick came off the scaffold where he was working.

The contractors' men used an electric drill from the outside in order to enlarge the openings by what was called a breaking out process, so that most of the dislodged bricks fell inside the building but some did fall outside and most of these would fall straight to the ground between the wall and the scaffolding which was erected against the wall of the building. This scaffolding erected by the contractors covered the entire side of the building. It was tubular scaffolding. At ground level on the street there was steel shuttering which was some seven feet in height. Above it there was wire netting extending approximately four feet higher. At a position some distance higher there was constructed an apron or canopy.

The perimeter of each window aperture was made regular and of the right size by the sub-contractor's bricksetter who followed the contractors after the breaking out had been done. An interval of a week or so would normally elapse between the breaking out and the final bricksetting. The openings, therefore, might after the breaking out had been done be ragged and have on their edges loose or detached bricks which might fall to the ground.

While the breaking out was being done, but not at other times, the contractors used tarpaulin sheeting to keep the brickwork from falling outwards and posted

A a man in the road to warn passers by of the danger, because it sometimes happened that a brick or part of a brick fell into the road. This could happen if a brick in falling struck one of the tubular pieces of scaffolding with sufficient velocity and at such an angle as to throw it into the road over the apron which had a plank at its outer edge acting as a kind of lip. The apron extended outwards and upwards from the scaffolding for about five feet and was designed to catch falling débris. The upper floor where the work was being done was protected on the outside by wire netting and near the ground there were shutters outside the scaffolding which extended from the ground to a height of seven feet, and above these there was more wire netting to the height of a further four feet. The scaffolding was described as the best of its kind and there was no suggestion in evidence that a type of scaffolding affording more adequate protection could practically have been devised. The contractors recognised the possibility of bricks ricochetting over the apron off the scaffolding through the unwired space and that such an event might happen if a brick were left delicately poised in an aperture or on any portion of the building itself or of the scaffolding. This might possibly occur even if no one was working or otherwise causing vibration in the building itself, but no brick had ever to the knowledge of the witnesses cleared the apron and fallen into the road except when the breaking out operation was being performed. The chance of such an event when, as in this case, no breaking out was being done was therefore remote. Precautions were, however, taken to meet such an eventuality in that after the contractor's men had finished drilling the wall they went round clearing up and making sure that there were no loose bricks left in the perimeter of the openings. The foreman who was called as a witness did not inspect each hole himself personally. That inspection was carried out by a foreman over the men on the drill, a man named Boon, who, having died, was not available as a witness.

The stage in the work which had been reached by the day when the plaintiff was struck was that breaking out had previously been done on the top floor and some bricking in had been completed: the bricking in of two or three windows remained to be done. At the third-storey level breaking out had created two or three openings, none of which had been bricked in. When the work of bricking in was taking place it might be that the bricklayer would have some brick or part of a brick to reject and might deliberately throw it down between the platform and the side of the building in the hope that it would just fall to ground level between the steel shuttering and the building.

G One other reason why pieces might fall at times when the drill was not actually being used was that the hacking out of a hole in a brick wall would leave some bricks or parts of bricks unsupported. There was therefore grave risk of leaving some pieces of bricks so insecurely supported that vibration might dislodge them and yield them to the pull of gravity. There was one other way in which a brick or part of a brick might fall even when breaking-out was not taking place. H A brick might previously have fallen and become lodged or poised in the scaffolding and might pass unnoticed and not be cleared away.

GORMAN, J., found that no negligence had been proved against any of the defendants, and accordingly dismissed the plaintiff's claim. The plaintiff appealed. The second defendant, the sub-contractor, was not a respondent to the appeal.

I *Fenton Atkinson, Q.C., H. Hague and G. D. Petherick* for the plaintiff.

Norman Richards, Q.C., G. Heilpern and R. E. G. Howe for the first and third defendants, the contractors and the occupiers.

Cur. adv. vult.

July 1. The following judgments were read.

HODSON, L.J.: The plaintiff was walking along the pavement of Back Darwen Street, Blackburn, on Sept. 16, 1956, when he was struck by a

brick which came from premises on the side of the road opposite to the pavement on which he was walking. He has brought an action for damages for personal injuries against the first defendants, who are contractors and were engaged in work on the premises from which the brick came. The accident happened while the contractors were engaged on the work of alteration. The plaintiff later joined the second defendant, the sub-contractor employed by the main contractors to perform the operation of bricking up apertures in the sides of the premises, such apertures having been enlarged by the contractors in order that new windows might in due course be put into the building. He also joined as third defendants the North Western Electricity Board who are the owners and occupiers of the building. The plaintiff failed in his action, which was framed in negligence, the learned judge finding that no negligence was proved against any of the defendants. The plaintiff has appealed, joining only the contractors and the occupiers as respondents to his appeal. A
B
C

No one knows how or why the brick fell, and the plaintiff contends that "*res ipsa loquitur*", for the brick speaks just as the barrel of flour in *Byrne v. Boadle* (1) ((1863), 2 H. & C. 722). In his judgment POLLOCK, C.B., used the following language (*ibid.*, at p. 728):

"So in the building or repairing a house, or putting pots on the chimneys, if a person passing along the road is injured by something falling upon him, I think the accident alone would be *prima facie* evidence of negligence . . . The present case upon the evidence comes to this, a man is passing in front of the premises of a dealer in flour, and there falls down upon him a barrel of flour. I think it apparent that the barrel was in the custody of the defendant who occupied the premises, and who is responsible for the acts of his servants who had the control of it; and in my opinion the fact of its falling is *prima facie* evidence of negligence, and the plaintiff who was injured by it is not bound to show that it could not fall without negligence, but if there are any facts inconsistent with negligence it is for the defendant to prove them." D
E

It has been contended here, and this contention appears to have found favour with the learned judge, that the maxim "*res ipsa loquitur*" has no application where there is more than one defendant, for the thing cannot speak effectively against either unless the facts are precisely known. F

I do not accept this contention. Once it is found that the third defendants were in occupation while the first defendants employed by them as contractors were carrying on work involving the dislodgment of bricks, I think that there is a *prima facie* case against both. G

So far as the occupiers are concerned, the law as stated in *Penny v. Wimbledon Urban Council* (2) ([1899] 2 Q.B. 72 at p. 78) is applicable:

"When a person, through a contractor, does work which from its nature is likely to cause danger to others, there is a duty on his part to take all reasonable precautions against such danger, and he does not escape from liability for the discharge of that duty by employing the contractor if the latter does not take these precautions. I desire to point out that accidents arising from what is called casual or collateral negligence cannot be guarded against beforehand and do not come within this rule." H

No question of collateral negligence arises here. No one knows how the accident came about and the defendants do not seek to say that if there was negligence it was of a collateral nature. I

So far as the contractors, the first defendants, are concerned, there is a *prima facie* case against them also, since they were performing work at the material time which involves the loosening or dislodging of bricks from the building.

The existence of the sub-contractor, the second defendant, does not carry with it any uncertainty as to the identity of the person against whom the plaintiff is entitled to claim, although the sub-contractor and not the main contractors may

A have been responsible for dislodging the brick. This I think follows from the decision of this court in *Maxwell v. British Thomson-Houston Co., Ltd.* (3) ((1902), 18 T.L.R. 278). There work was being done on a highway and it was the contractor's duty to take reasonable precautions to protect the public, and he could not escape that duty by delegating the work to a sub-contractor. It was a case where the contractors were employed by the Corporation of Leeds, and it was, as in *Penny's* case (2), clearly stated that by employing a contractor the corporation could not get rid of its own duty. I am of opinion, therefore, and in this I differ from the learned judge, that the plaintiff established a prima facie case against both the contractors and the occupiers, and in the absence of any evidence to show that there was no negligence in the conduct of the operations, the plaintiff would, I think, have been entitled to succeed.

C The learned judge did not, however, confine himself to saying that the plaintiff had made out no prima facie case by proving that he was hit by a brick which came from the premises in question when he was lawfully on the highway and the first defendants, the contractors, were working on the building of which the third defendants were the owners and occupiers. He went on to deal with the case on the footing that the defendants who are now respondents to this appeal had by the evidence called before the court satisfied him that there was no negligence, that is to say, that they had taken all reasonable steps in the performance of the work to prevent injury to persons using the highway. It is this question which has been the main subject of consideration before this court. The plaintiff submits that since the fall of the brick is prima facie evidence of failure on the part of the contractors and the occupiers to carry out the work without negligence and there is no explanation of the accident at all, still less one which does not connote negligence, there should be judgment for the plaintiff. Although there is no such explanation, e.g., that the fall of the brick had been caused by the subsidence of the building due to some cause over which the defendants had no control and could not reasonably have anticipated, nevertheless the defendants are entitled to succeed if they can prove that there was no negligence on their part, that is to say, that they took all reasonable precautions to prevent injury to users of the highway; compare *Moore v. R. Fox & Sons* (4) ([1956] 1 All E.R. 182). It is necessary to consider what work was being done and what precautions were taken.

The building from which the brick fell was a large four-storey building which had formerly been a generating station, and the intention of the occupiers was to turn it into offices. [His LORDSHIP here stated the facts and considered the evidence, and continued:] The system of inspection was proved to the satisfaction of the learned judge and I cannot hold that the absence of Mr. Boon* produces such a gap in the evidence of the defendants that they cannot be said to have proved that they not only had a good system of inspection but also worked that system efficiently. On the whole of the evidence the learned judge—and I agree with him—held that the defendants had discharged the burden which, on the footing that the plaintiff had made out a prima facie case, lay on them to prove that they had taken all reasonable precautions to prevent injury to users of the highway.

I would dismiss the appeal.

I MORRIS, L.J.: I would be in favour of allowing this appeal. [His LORDSHIP stated the facts and continued:] As DENNING, L.J., pointed out in his judgment in *Mint v. Good* (5) ([1950] 2 All E.R. 1159), the law of England has always taken particular care to protect those who use a highway and puts on the occupier of adjoining premises a special responsibility for the structures which he keeps beside the highway. Thus if a shopkeeper chooses to have a lamp overhanging his shop door, he is himself under a duty to his customers to

* Mr. Boon was the contractors' foreman who inspected each cavity for loose bricks after the drillers had finished enlarging it; he died before the hearing.

use reasonable care to see that it is safe, and he does not escape that duty by employing an independent contractor to do it; see *Tarry v. Ashton* (6) ((1876), 1 Q.B.D. 314) and also *Cassidy v. Ministry of Health* (7) ([1951] 1 All E.R. 574). In the latter case, DENNING, L.J., said (*ibid.*, at p. 586):

"I take it to be clear law, as well as good sense, that, where a person is himself under a duty to use care, he cannot get rid of his responsibility by delegating the performance of it to someone else, no matter whether the delegation be to a servant under a contract of service or to an independent contractor under a contract for services."

When the occupiers decided to have work done which involved cutting away parts of a wall abutting the highway, which might mean that some of the bricks in the wall would be insecure in positions above the highway, they became in my judgment under a clear duty to take care to avoid the risks of injuring passers-by. The law does not impose unreasonable burdens, but it exacts a standard of care which is directed by the circumstances. If someone chooses to take away bricks from a wall which is at a height above a street, it is not unreasonable to require that he will not thereafter leave them so placed or poised that they will fall in the street. Nor, if he loosens bricks and leaves them perilously supported so that if they become dislodged they would fall into the street, is it unreasonable to require that he must arrange a place to receive them if they do come away. The seriousness of consequences must be a factor in assessing the quality of the care which is requisite. A falling brick might easily cause a death. It would be very likely if it hit someone to cause grave injuries. Any reasonable man would foresee these potential perils to users of the highway. While standards of reasonableness must be adhered to, it is no answer if an accident occurs which by using care could have been avoided to say that certain safety measures or precautions were taken which nearly succeeded. [His LORDSHIP then considered the evidence in detail and continued:] The position was, therefore, that while the plaintiff was lawfully and ordinarily using the highway a brick fell on his head which came from this building. In these circumstances it seems to me that there is application of the principle expressed in *Scott v. London Dock Co.* (8) ((1865), 3 H. & C. 596), where ERLE, C.J., said (*ibid.*, at p. 601):

"There must be reasonable evidence of negligence. But where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care."

The luckless plaintiff in the present case did not any more know why the half-brick fell on his head than did the plaintiff in *Byrne v. Boodle* (1) ((1863), 2 H. & C. 722) know why the barrel had fallen. In his judgment in that case POLLOCK, C.B., said (*ibid.*, at p. 728):

"A barrel could not roll out of a warehouse without some negligence, and to say that a plaintiff who is injured by it must call witnesses from the warehouse to prove negligence seems to me preposterous. So in the building or repairing a house, or putting pots on the chimneys, if a person passing along the road is injured by something falling upon him, I think the accident alone would be *prima facie* evidence of negligence."

How then do the contractors explain the matter? The only two witnesses from the contractors' firm were Mr. Woodcock, the scaffold foreman, who was called on behalf of the plaintiff, and Mr. Lancaster, the general foreman, whom the defendants called. The witnesses frankly stated that they could not explain why the brick fell. They did not know. It seems to me that no evidence was given which displaced the evidence of negligence. To adopt the language used by LORD RADCLIFFE in *Barkway v. South Wales Transport Co., Ltd.* (9) ([1950]

A I All E.R. 392 at p. 403), the event of a brick falling on to the highway during building operations is one which "in the ordinary course of things is more likely than not to have been caused by negligence". Such an event is by itself evidence of negligence. Bricks that are left secure do not fall. Unless someone within the building threw down the half-brick which hit the plaintiff—which was not suggested—then it fell because someone had left it insecure.

B In some cases where it is sought to employ the maxim "res ipsa loquitur" difficulties may arise if there is more than one defendant. When it is suggested that an event is by itself evidence of negligence, the evidence is not of full value unless it shows who was negligent; but in the present case the evidence seems to exclude the sub-contractor from liability. Hence if the evidence establishes negligence in some person or persons such person or persons were the servants of the contractors. Though the occupiers employed the contractors as such,

C the occupiers cannot exclude themselves from liability. The duty of the occupiers to take care that bricks are not dropped from their building on to passers-by in the street is not in abeyance because they employ contractors to do work on their building. They cannot in the present case claim absolution on the basis that there was some "casual act of wrong or negligence" on the part of their

D contractors. Neither the occupiers nor the contractors can explain the matter. How then can the occupiers say that it resulted from some casual act on the part of the contractors. The removal of bricks from the wall abutting the street and the reconstruction of such wall were essential parts of what the contractors were employed to do (see *Pickard v. Smith* (10) (1861), 10 C.B.N.S. 470 at p. 480, and see also *Penny v. Wimbledon Urban Council* (2), [1899] 2 Q.B. 72).

E It is manifest that the contractors and the occupiers owed a duty to take great care to ensure that bricks should not fall on passers-by. The evidence establishes that after the breaking-out process bricks might be left insecure around the perimeters of the holes made in the walls. The holes had to be examined. They had to be examined with the knowledge that visual examination alone might not suffice. Furthermore, the evidence shows that bricks might

F lodge on a platform or lodge in the scaffolding and that any such ought to be removed. It was known that if any bricks fell they might bounce out into the street. No evidence was given, however, whether any inspection took place after the last breaking out operation. The evidence did not establish when it was that breaking out last took place*. There was a reference (in the passages which I have read) that the men when they had finished with the pneumatic drill would

G go round cleaning up; but the evidence was not clear whether the men would in the first place inspect or whether the only inspection was by Mr. Boon who was the foreman over the men on the drill. Mr. Boon unhappily had died. No operator of a drill was called. No one was called who said that he had inspected. Mr. Lancaster had a general supervision over the whole work but it was not his task personally to inspect the openings in the wall. The evidence does not show

H how many men the contractors had on the site. None of them was called. It is not known whose duty it was to examine the scaffolding after breaking out to see whether any bricks were lodging. I do not know whether the man who was posted in the street during breaking out had this duty or indeed whether it was assigned to anyone.

I In my judgment the barrenness of the defendants' evidence leaves the matter thus. The possibility that a brick might fall and might be projected on to the street was not only foreseeable but it was realised: either there was no proper system designed to avert the occurrence of the possible (and highly dangerous) event or if there was it was not carried out. I see no reason to suppose that a properly conducted inspection would not have revealed any brick that was insecurely supported either in some position in the wall or in some position on the scaffolding.

* No breaking out took place on the day of the accident; see p. 41, letter A, post.

The defendants rely on certain testimonials given in evidence as to the excellence of the scaffolding. It was one of the best that Mr. Lancaster had ever seen. So it may have been, but the plaintiff was nevertheless struck on the head. When Mr. Woodcock* was being cross-examined it was entirely legitimate to put to him the following leading question: A

“ If I may sum up: would it be right to say that, in your opinion, the scaffold was perfectly safe as regards the erection and the preventing of materials falling on to the road ? ” B

The expected answer was given: “ It was ”; but it is manifest that the scaffold did not prevent falling materials from shooting on to the road and the defendants knew that. Reliance was placed on another answer given by Mr. Woodcock in cross-examination. He said that nothing more could have been done by anybody to prevent a half-brick falling. If that meant that after breaking out had been undertaken a barely supported hanging brick might not have been detected, it seems impossible to accept that it could not with care have been detected. Doubtless great care would be needed, but the gravity of the risks and their consequences imposed a duty to take great care. If such a brick fell I cannot think that steps could not have been taken to prevent its reaching the street; but quite apart from this the duty was to make safe the bricks in the wall which abutted the street and not to leave them so that some of them might fall out. C D

In his judgment in *Moore v. R. Fox & Sons* (4) ([1956] 1 All E.R. 182) LORD EVERSHED, M.R., adopted the reasoning of ASQUITH, L.J., in *Barkway v. South Wales Transport Co., Ltd.* (9) ([1948] 2 All E.R. 460). In *Moore v. Fox* (4) there was an accident in circumstances which made the maxim “ *res ipsa loquitur* ” apply. The accident was left unexplained. It was held that it was not sufficient to show that there were several hypothetical causes consistent with an absence of negligence, but that the defendants had to go further and either must show that they had not been negligent or must give an explanation of the cause of the accident which did not connote negligence by them. E

In my judgment a consideration of the evidence given in this case results in the conclusion that the offending brick was allowed or caused to fall owing to negligence and the evidence does not suggest how the accident could have happened without negligence. If the evidence had negated the existence of negligence in the contractors, then they would be absolved even if they could not explain why the brick fell (see *Woods v. Duncan* (11), [1946] A.C. 401 at pp. 419, 425, 434, 439). In my judgment, however, the evidence before the court falls far short of rebutting the strong inference of negligence. It is not like a case where the conduct of one man only is being considered. The conduct of all the contractors’ men was in issue. It is not clear how many there were or who they were or in which of them was reposed the duty of seeing that bricks were not so left that they could or might fall. In my judgment liability was established against the contractors and the occupiers. I consider that the plaintiff is entitled to recover damages to be assessed and I would allow the appeal. F G H

SELLERS, L.J., outlined the facts and continued: The more I have heard of this case the more difficult have I found it to accept the probability that the plaintiff was hit on the head by a brick from the building in question having the scaffolding erected in front of it; but before this court the finding of the learned judge that that is how the accident happened was not seriously attacked and was finally accepted on behalf of the defendants who appeared. The question of liability of the defendants has therefore to be considered in that light. The continuing effect in my view is that the liability of the defendants depends in part on the reasonable foreseeability by the defendants of such an accident I

* Mr. Woodcock was a foreman scaffolder employed by the contractors, the first defendants.

- A occurring to anyone on the footpath. Having regard to the precautions which were taken and to the circumstances that no demolition of the wall by pneumatic drill was taking place at the time or had taken place at all that day, for myself I find it difficult to say that the defendants or any of them should have foreseen such an accident as a likely thing to occur, so as to require them to have taken even greater precautions to guard against such a happening. [HIS LORDSHIP
- B briefly reviewed the precautions taken, which are described at p. 34, letter G, to p. 35, letter E, ante, and continued:] No case was made or attempted to be made that the protection provided was not in accordance with the highest standard and completeness and I do not find even a suggestion that anything more should have been done. [HIS LORDSHIP then considered various ways in which the brick could have fallen, and continued:] The accident is, as I see it,
- C left quite unexplained. The defendants who appeared have established that they took reasonable precautions, as the judge has found. The servant* of the defendant sub-contractor, who did not appear, has been exonerated of any negligence. In these circumstances, I agree with the learned judge that it is not possible to find negligence established against any of the three defendants. The matter remains a mystery, which tends to support in my mind the view that
- D it did not happen.

As the occupiers had authorised work to be done adjoining the highway which might without due precautions cause injury to anyone on the highway, the authorities already cited by my Lords show that the occupiers would be liable for the negligence of the contractors or sub-contractor in failing to take due precautions. Likewise the contractors would be liable for any negligence in the

E performance of their duties delegated to sub-contractors. Therefore the plaintiff was entitled to say that the defendants were required to exonerate themselves from blame in order to escape liability. Once it is postulated or accepted that the plaintiff was hit by a brick and that the brick came from the building in question, it set up a prima facie case of liability, at least against the contractors and occupiers.

- F In the light of evidence given, however, no negligence can be inferred. Counsel for the defendants relied on several passages in the speeches in the House of Lords in *Woods v. Duncan* (11) ([1946] A.C. 401). I quote two passages. LORD RUSSELL OF KILLOWEN said ([1946] A.C. at p. 425):

"My Lords, assuming that the principle of *res ipsa loquitur* applies, and establishes that *prima facie* Lieutenant Woods must have been negligent,

G it is open to him to prove affirmatively (as in my opinion, he has) that he did throughout exercise reasonable care. The principle does not involve this—that, notwithstanding that affirmative proof, he must be held to have been negligent, unless he can solve the mystery and prove how the bow-cap came to be open at the critical moment."

The other passage is in LORD SIMONDS' speech (*ibid.*, at p. 439):

- H "I will assume . . . that this is a case in which the principle of *res ipsa loquitur* may be applied. But to apply this principle is to do no more than shift the burden of proof. A *prima facie* case is assumed to be made out which throws upon him [i.e. the defendant] the task of proving that he was not negligent. This does not mean that he must prove how and why the accident happened: it is sufficient if he satisfies the court that he personally
- I was not negligent. It may well be that the court will be more easily satisfied of this fact if a plausible explanation which attributes the accident to some other cause is put forward on his behalf; but this is only a factor in the consideration of the probabilities. The accident may remain inexplicable, or at least no satisfactory explanation other than his negligence may be offered: yet, if the court is satisfied by his evidence that he was not negligent, the plaintiffs' case must fail."

* He was Mr. Lord who was the only man working on the outer wall or scaffolding on the day of the accident.

Against this, reliance was placed by the plaintiff on the observations of the Master of the Rolls in *Moore v. R. Fox & Sons* (4) ([1956] 1 All E.R. 182), which, as applied to this case, counsel for the plaintiff submitted, required that proof of proper inspection of the perimeters and scaffolding should have been given. The responsible person in charge of this work was Mr. Boon, a foreman, who unfortunately had died and could not give evidence; but Mr. Lancaster, a supervising foreman, and another foreman, Mr. Woodcock, were called, and it does not seem to me that it can properly be inferred that the duty to inspect the work for loose bricks was not performed or was performed negligently. The organisation of the work and the adequate supervision of experienced foremen were not challenged. It would, I think, be pure speculation to hold that a brick (or half-brick) which had remained safely in some unknown position for at least the greater part of a night and day must have been observed to have been in a dangerous position if someone had inspected.

The Master of the Rolls' decision in *Moore v. Fox* (4) was based largely on the statement of the law extracted from ASQUITH, L.J.'s judgment in *Barkway v. South Wales Transport Co., Ltd.* (9) ([1948] 2 All E.R. 460); but it is to be observed that ASQUITH, L.J., found in favour of the defendants in that case on the ground that although there was no explanation of how or when the tyre had become so defective that it was liable to burst, nevertheless the defendants had shown they were not negligent. The majority decision of the Court of Appeal did not prevail in the House of Lords, because it was there held that there were further precautions which the defendants might have taken to ascertain damage to tyres in addition to their routine methods to that end. These were precautions which the defendants had not considered and had not taken.

If the facts were known, it might be that there had been some casual or collateral act of negligence on the part of the contractors' or sub-contractor's servants in this case for which the occupiers would not be liable, or on the part of the sub-contractor's men for whom the contractors would not be liable. But to attempt to suggest possibilities would be the height of conjecture, and therefore any attempt to reconcile the cases or to define the line demarcating liability for an independent contractor's defaults does not arise. On the face of it, a building owner who authorises work is not liable for the negligence of a contractor's workman in dropping one of his tools, e.g., a trowel or a hammer. Authority shows clearly that he is not. Ought it to be held that it would be otherwise if a bricklayer or his mate negligently dropped a hod with or without bricks in it or a brick without dropping the hod, because bricklaying was the work the contractor was employed and authorised to do? As Mr. Lord* has not been found to have been negligent, the question does not arise.

Although the plaintiff was innocently walking on the footpath and was in no way to blame, I feel bound to reach the same conclusion as the trial judge, that a full investigation of the facts has failed to bring home liability against the defendants or any of them. To hold otherwise would be, in effect, to make the defendants insurers of the plaintiff's safety and to make them as liable as they would have been if they had omitted to take the elaborate precautions which they had taken.

I would dismiss the appeal.

Appeal dismissed. Leave to appeal to the House of Lords granted.

Solicitors: *Robinson & Bradley*, agents for *Holden, Blanthorne & Davies*, Blackburn (for the plaintiff); *Carpenters*, agents for *G. Keogh & Co.*, Bolton (for the contractors and the occupiers).

[Reported by HENRY SUMMERFIELD, Esq., Barrister-at-Law.]

* He was the servant of the second defendant, the sub-contractor, who was working on the building on the day when the accident happened.

A

NOTE.

WING v. SPRING.

[CHANCERY DIVISION (Upjohn, J.), July 24, 1958.]

B

Legal Aid—Costs—Liability of legally assisted person for costs assessed—Change in circumstances—Motion for variation of order against legally assisted person—Practice in Chancery Division—Legal Aid (General) Regulations, 1950 (S.I. 1950 No. 1359), reg. 17 (4), as substituted by Legal Aid (General) (Amendment No. 1) Regulations, 1954 (S.I. 1954 No. 166).

C

[For the Legal Aid (General) Regulations, 1950, reg. 17 (4), as substituted by the Legal Aid (General) (Amendment No. 1) Regulations, 1954, see HALSBURY'S STATUTORY INSTRUMENTS, Service.]

Case referred to:

(1) *Corrick v. Northam*, [1956] 2 All E.R. 174; 3rd Digest Supp.

Motion after judgment.

D

This was a motion on behalf of the defendant, in whose favour judgment had been given in an action brought by the plaintiff who had been a legally assisted person. The motion was brought to vary the plaintiff's liability for costs under reg. 17 (4) of the Legal Aid (General) Regulations, 1950, as substituted by the Legal Aid (General) (Amendment No. 1) Regulations, 1954.

R. Fortune for the applicant, the defendant.

E

D. R. Stanford for the respondent, the plaintiff.

UPJOHN, J.: Although I am not making any order today because I regard this application as premature, it may be convenient to say that, on a motion to vary an order for costs under reg. 17 (4) of the Legal Aid (General) Regulations, 1950, as substituted by the Legal Aid (General) (Amendment No. 1) Regulations, 1954, the practice should be the same in the Chancery Division as in the Queen's Bench Division, but with one variation.

F

The practice in the Queen's Bench Division is set out in a note to *Corrick v. Northam* (1) ([1956] 2 All E.R. 174). It is in these terms, so far as relevant:

"Where a party in whose favour an order for costs has been made against an assisted person after trial by a judge of the Queen's Bench Division in London or on circuit, desires to apply 'to the court' under the Legal Aid (General) Regulations, 1950, reg. 17 (4), for variation of the order, the application should be made by notice of motion (R.S.C., Ord. 52) before the judge who made the order, if convenient, or to the judge in charge of the appropriate list."

G

That seems to me equally applicable in the Chancery Division, but with this variation. If it is not convenient for the judge who made the order to hear the matter, the motion should be made to the judge in charge of the non-witness list in the appropriate group.

H

I say no more about this motion, except that it stands over generally with liberty to either party to apply to restore it.

Solicitors: *Spring & Co.* (for the defendant); *Kingsbury & Turner* (for the plaintiff).

[Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.]

GREEN v. RUSSELL (McCARTHY Third Party).

[QUEEN'S BENCH DIVISION (Ashworth, J.), July 1, 2, 3, 11, 1958.]

Fatal Accident—Damages—Assessment—Deductions from damages—“Any sum paid or payable . . . under any contract of assurance”—Policy taken out by employer to insure against injuries to or death of employee—Employee having no contractual right to receive benefit although a reasonable expectation of benefit—Employee and employer killed in fire and policy moneys paid by employer's personal representative to employee's administratrix—Whether amount of benefit deductible from damages payable to administratrix by employer's personal representative—Fatal Accidents (Damages) Act, 1908 (8 Edw. 7 c. 7), s. 1.

R., an employer, took out an insurance policy, described as a personal accident group policy, with the Y. company. The policy, having recited, “whereas the insured [viz., R.] is desirous of securing payment of benefits as hereinafter set forth to any insured person in the event of his sustaining accidental bodily injury”, provided that, if any insured person should sustain bodily injury resulting in death, the company would pay the sum insured which was set out in a schedule to the policy. It was a condition of the policy that “the company shall be entitled to treat the insured as the absolute owner of this policy . . . and the receipt of the insured or the insured's legal representative alone shall be an effectual discharge”. R. paid the premiums on the policy. G., an employee of R., was one of the insured persons under the policy and by it R. was insured for £1,000 in the event of G.'s death from bodily injury. The existence of the policy was known to G. and the other employees of R., so that they had a reasonable expectation of benefit for their dependants should they be killed, but they had no contractual right to receive any benefit under the policy. As a result of a fire at the premises where G. was employed by R., both G. and R. died, and in an action by G.'s mother, as administratrix of his estate, under the Fatal Accidents Acts, 1846 to 1908, and the Law Reform (Miscellaneous Provisions) Act, 1934, claiming damages against the personal representative of R. for R.'s negligence in causing the fire, liability was admitted and damages were agreed at £1,300. The question then arose whether £1,000 which the Y. company had paid to R.'s personal representative under the policy, in respect of G.'s death, and which R.'s personal representative had decided to pay to G.'s mother, should be deducted from the agreed damages as being a benefit arising on the death of G. or was not deductible by virtue of s. 1 of the Fatal Accidents (Damages) Act, 1908, whereby “any sum paid or payable on the death of the deceased under any contract of assurance” is not to be taken into account.

Held: (i) though neither the deceased, G., nor his administratrix had any right enforceable at law or in equity to the £1,000 policy moneys, those moneys were within the wide description in s. 1 of the Fatal Accidents (Damages) Act, 1908, “any sum paid or payable on the death of the deceased under any contract of assurance”, which did not imply that the sum must be one that was payable to G.'s estate “under [the] contract of assurance”, for those were words descriptive of the sum itself; therefore, the £1,000 must not be deducted from the agreed damages.

(ii) (*obiter*) the plaintiff had not established that R. had constituted himself a trustee of the £1,000, as the recital in the policy did not amount to a declaration of trust and there was no other evidence to indicate that R. had intended to constitute himself a trustee of the policy moneys.

Bowskill v. Dawson ([1954] 2 All E.R. 649) distinguished.

Dicta of LORD GREENE, M.R., and DU PARCQ, L.J., in *Re Schebsman* ([1943] 2 All E.R. at pp. 770, 779) applied.

A [As to deductions from damages claimed under the Fatal Accidents Acts, see 23 HALSBURY'S LAWS (2nd Edn.) 698, 699, para. 986; and for cases on damages recoverable under the Fatal Accidents Acts, see 36 DIGEST (Repl.) 220-225, 1159-1194.

For the Fatal Accidents (Damages) Act, 1908, s. 1, see 17 HALSBURY'S STATUTES (2nd Edn.) 10.]

B Cases referred to:

(1) *Bowskill v. Dawson*, [1954] 2 All E.R. 649; [1955] 1 Q.B. 13; 3rd Digest Supp.

(2) *Baker v. Dalgleish S.S. Co., Ltd.*, [1922] 1 K.B. 361; 91 L.J.K.B. 392; 36 Digest (Repl.) 223, 1191.

C (3) *Peacock v. Amusement Equipment Co., Ltd.*, [1954] 2 All E.R. 689; [1954] 2 Q.B. 347; 3rd Digest Supp.

(4) *Re Schebsman, Ex p. Official Receiver, Trustee v. Cargo Superintendents (London), Ltd. & Schebsman*, [1943] 2 All E.R. 768; [1944] Ch. 83; 113 L.J.Ch. 33; 170 L.T. 9; 2nd Digest Supp.

(5) *Vandepitte v. Preferred Accident Insurance Corpn. of New York*, [1932] All E.R. Rep. 527; [1933] A.C. 70; 102 L.J.P.C. 21; 148 L.T. 169; Digest Supp.

D (6) *Prudential Staff Union v. Hall*, [1947] K.B. 685; [1948] L.J.R. 618; 2nd Digest Supp.

(7) *Smith v. River Douglas Catchment Board*, [1949] 2 All E.R. 179; 113 J.P. 388; sub nom. *Smith & Snipes Hall Farm, Ltd. v. River Douglas Catchment Board*, [1949] 2 K.B. 500; 2nd Digest Supp.

E (8) *Drive Yourself Hire Co. (London), Ltd. v. Strutt*, [1953] 2 All E.R. 1475; [1954] 1 Q.B. 250; 3rd Digest Supp.

(9) *Pyrene Co., Ltd. v. Scindia Steam Navigation Co., Ltd.*, [1954] 2 All E.R. 158; [1954] 2 Q.B. 402; 3rd Digest Supp.

Action.

F This was an action in which Florence Green, the plaintiff, as administratrix of the estate of Alfred Edward Green, deceased, her son, claimed damages under the Fatal Accidents Acts, 1846 to 1908 and the Law Reform (Miscellaneous Provisions) Act, 1934, in respect of the death of the deceased as the result of a fire at 11, Duke Street Hill, London Bridge, S.E.1, on June 6, 1955. The plaintiff alleged that the fire was caused by the negligence of Arthur Henry Russell, the deceased's employer, who also died in the fire, and she claimed damages against Sarah Ann Russell, the defendant, as administratrix of Mr. Russell's estate. Liability having been admitted by the defendant and the amount of damages to be awarded to the plaintiff having been agreed at £1,300, the question arose whether a sum of £1,000, paid to the defendant under a personal accident group policy of insurance taken out by Mr. Russell which recited his desire to secure payment for the benefit of his employees but provided for payment in the event of death being made to Mr. Russell's personal representatives, should be deducted from the plaintiff's agreed damages as being a benefit which arose from the deceased's death. The sum of £1,000 had been or was about to be paid to the plaintiff. The facts relating to this issue and the relevant terms of the insurance policy are set out in the reserved judgment delivered by ASHWORTH, J.

I *Marven Everett, Q.C.*, and *J. Ritchie* for the plaintiff.
M. D. Van Oss for the defendant.

Cur. adv. vult.

July 11. ASHWORTH, J., read the following judgment: This action arises out of the death on June 6, 1955, of Mr. Alfred Edward Green, the plaintiff, Florence Green, being his mother. The defendant is the widow of Mr. Arthur Henry Russell, who died on the same day and who was Mr. Green's employer. The cause of death was a disastrous fire which occurred in the premises where

both men worked, but as liability is admitted, it is unnecessary to consider further the circumstances surrounding the tragedy. Nor do I need to do more than mention the fact that third-party proceedings were taken, since those proceedings were settled out of court. A

Subject to the issue which has been argued before me, the damages to be awarded to the plaintiff were agreed at a figure of £1,300. That issue raises the question whether a sum of £1,000, which has been or is about to be paid to the plaintiff, should be deducted from the agreed figure on the ground that it represents a benefit arising out of the death of Mr. Green which must be set off against the loss which the plaintiff sustained by reason of his death. For the plaintiff it is contended that the sum of £1,000 should not be deducted, in that it falls directly within the provisions of s. 1 of the Fatal Accidents (Damages) Act, 1908, as being a sum paid on the death of Mr. Green under a contract of insurance. B C

Mr. Russell was an architect employing a small number of men, of whom Mr. Green was one. In the year 1951 he decided to enter into a form of insurance in respect of some at least of his employees, and submitted to the Yorkshire Insurance Company, Ltd. (hereinafter referred to as "the insurance company"), a proposal dated Sept. 25, 1951. I do not think that anything turns on the wording of this proposal, but the policy which was issued as a result is of considerable importance. It is described as being a Personal Accident Group Policy and it starts with a recital in the following terms: D

"Whereas the insured is desirous of securing payment of benefits as hereinafter set forth to any insured person in the event of his sustaining accidental bodily injury as hereinafter provided . . ."

It is clear from the schedule on the back of the policy that "the insured" meant Mr. Russell and that "insured persons" were the persons whose names were listed in the schedule, namely, employees of Mr. Russell. By some mischance Mr. Green's name did not appear in the original list, but it is accepted that he was at some time included in the list of insured persons, and indeed there is attached to the policy an indorsement by which his name was deleted with effect from his death in June, 1955. E F

Following the recital, the policy provided that if any insured person should sustain bodily injury resulting in death, the company would pay the sum insured stated against section A in the schedule, in this instance £1,000. It is to be noted that this provision does not in terms state to whom the payment is to be made, but condition 5 of the policy, which reads as follows, makes the position clearer: G

"The company shall be entitled to treat the insured as the absolute owner of this policy and shall not be bound to recognise any equitable or other claim to or interest in the policy, and the receipt of the insured or the insured's legal representative alone shall be an effectual discharge." H

It is common ground between the parties that the insurance company have paid £1,000 in respect of Mr. Green to the defendant's solicitors and that they have paid over part of that sum to the plaintiff and are in process of paying over the balance.

The plaintiff's case before me was closed without any oral or documentary evidence being tendered for the purpose of showing that under the terms of their employment with Mr. Russell his employees acquired any contractual rights against him in respect of the policy or indeed that they were aware of its existence. After counsel for the defendant had begun his argument for the defendant application was made on behalf of the plaintiff to call two witnesses who were at the material time in Mr. Russell's employment. Not without some hesitation and in spite of objection by counsel for the defendant, I acceded to the application, and the witnesses Biggs and Warwick were accordingly called. I

A As a result of their evidence it is, to my mind, plain that the terms of their employment did not include any provision in regard to the policy. There was nothing in those terms which resembled the provisions contained in the booklet issued by the employers in *Bowskill v. Dawson* (1) ([1954] 2 All E.R. 649). On the other hand, I think that the existence of the policy was known to Mr. Russell's employees in such a manner as to create in their minds a reasonable expectation of benefit for themselves or their dependants in the event of their being injured or killed. I should perhaps add, in view of a point taken in the course of the argument in reply to counsel for the defendant, that I can find nothing which would justify the inference that the possibility of benefit under the policy affected the employees' attitude in regard to their employment; there was nothing to show that they refrained from giving notice or from asking for an increase in salary in consideration of the benefits which might come to them from the policy, nor was there anything to show that Mr. Russell undertook an obligation to maintain or renew the policy.

D The argument on behalf of the plaintiff may be summarised as follows. In the first place it was said that, in order to take advantage of what LORD WRIGHT* called the relaxation afforded by the Act of 1908, a plaintiff is not called on to establish that there was any enforceable right, legal or equitable, in the deceased or his personal representatives to claim the sum in question. All that has to be established is that the sum in question was a sum paid or payable on the death of the deceased under any contract of assurance or insurance. In the second place, and by way of alternative, it was said that on the facts of the present case Mr. Russell constituted himself a trustee of sums payable under the policy and that an employee or his personal representative could enforce in equity performance of that trust. In the third place it was said that inasmuch as the sums payable under the policy were in the light of the recital paid for the benefit of (inter alios) Mr. Green, he or his personal representatives had a right at common law to claim the sums even though he was not a party to the contract.

F The first of these submissions involves the problem which the Court of Appeal in *Bowskill v. Dawson* (1) expressly refrained from deciding. ROMER, L.J., said ([1954] 2 All E.R. at p. 656):

G "If the employees who were within the scheme had no rights under it at all, but merely an expectation of benefit dependent wholly on the volition and good will of their employers, it could, I suppose, be contended (and I express no concluded opinion on the validity of the contention) that such sums as their dependants might receive were mere bonuses and that the fact that they originated from a policy effected by the employers was merely a fortuitous and irrelevant consideration."

H If I may say so, the lord justice's supposition was right, since the contention envisaged by him was one of the main points in counsel for the defendant's argument. The reason why the Court of Appeal were free in that case to reserve the problem for future consideration was the existence of a scheme under which employees obtained rights, enforceable in equity, to receive sums paid under a policy of insurance. For reasons which will appear later, no such way of escape is open to me.

I The principle has for long been established that in assessing a claim under the Fatal Accidents Acts both the loss and the gain to the dependants arising from the death must be taken into account. If the gain arises by way of legal right, there is plenty of authority for saying that it must be taken into account, and I need only cite on this point two sentences from the judgment of SCRUTTON, L.J., in *Baker v. Dalgleish S.S. Co., Ltd.* (2) ([1922] 1 K.B. 361 at p. 372):

* See *Davies v. Powell Duffryn Associated Collieries, Ltd.*, [1942] 1 All E.R. 657 at p. 662.

“On the other hand, as the question is what is her pecuniary loss by the death, any pecuniary advantage she has received from the death must be set off against her probable loss. This is clear if she receives such advantage as of legal right.”

If the gain arises by way of a right enforceable in equity, the decision in *Bowskill v. Dawson* (1) is authority for saying that it must be taken into account. The third type of gain is gain to which neither the deceased nor his representatives have any claim enforceable in law or in equity, but in respect of which it may be said that there was a probability or reasonable expectation that it would be received. An example of this type is to be found in *Baker v. Dalgleish S.S. Co., Ltd.* (2), and the Court of Appeal held that the gain, which took the form of a pension from the Crown, should be taken into account. A fourth type of gain is such as arises purely and simply from the generosity or goodwill of the donor, there being no reason at the date of the death to expect it to arise. Such a case was considered by the Court of Appeal in *Peacock v. Amusement Equipment Co., Ltd.* (3) ([1954] 2 All E.R. 689), in which it was held that such gain should not be taken into account.

Section 1 of the Act of 1908 is in the following terms:

“In assessing damages in any action, whether commenced before or after the passing of this Act, under the Fatal Accidents Act, 1846, as amended by any subsequent enactment, there shall not be taken into account any sum paid or payable on the death of the deceased under any contract of assurance or insurance, whether made before or after the passing of this Act.”

Until the Act was passed, money paid under a life policy on the life of the deceased would have to be taken into account, and it may be supposed that one at least of the objects of the Act was to relieve dependants of the hardship of having compensation reduced by reason of the deceased's own thrift; but the language of the section is wide and, as ROMER, L.J., said in *Bowskill v. Dawson* (1) ([1954] 2 All E.R. at p. 655), it leaves something to the imagination. One of the points put forward on behalf of the defendant was that s. 1 constitutes, so to speak, a statutory exception to the general rule that gains must be taken into account, and accordingly that the burden was on the plaintiff to bring herself within the ambit of the section. On this basis it was further said that the language of the section ought not to be strained or given a wider interpretation than it could properly bear, even if the result bore hardly on the plaintiff. Assuming that the foregoing is the correct approach, there is still, in my judgment, a major difficulty in the defendant's way, namely, the absence of any words of limitation in the section. As it seems to me, there is no need to strain the language in order to give effect to the plaintiff's claim; on the other hand, to give effect to the defendant's argument involves the notional inclusion in the section of words of limitation restricting the scope of the section to cases in which the deceased or his representatives had some enforceable right to the sum in question. It would not be enough, having regard to the decision in *Bowskill v. Dawson* (1), to imply a provision that the contract of assurance or insurance must have been made by the deceased or on his behalf: words would be required to cover policies entered into or held in trust for the deceased. No doubt apt words could be selected for this purpose, but the plain fact is that they are not in the section now.

Emphasis was also laid on the fact that the section excludes a sum paid “under” a contract of insurance, and it was said that the sum of £1,000 paid to the plaintiff was not so paid, but was paid under a sense of moral obligation on the part of the defendant. In other words, to quote again from ROMER, L.J., in *Bowskill v. Dawson* (1) ([1954] 2 All E.R. at p. 656), the effect and force of the contract of insurance was exhausted when the sum in question was paid by the insurance company to the defendant. Although I appreciate that the problem

A now under consideration was left undecided by the Court of Appeal, it seems to me that this particular argument, if sound, would have been upheld in that case. In my judgment, the expression "paid or payable on the death of the deceased under any contract of assurance" is descriptive of the sum itself and does not involve by implication the corollary that the sum was paid or payable to the deceased under the contract of insurance. Moreover, I think that force is lent

B to this view by the double use of the word "any"; any sum, any contract of insurance.

It is perhaps worth mentioning that in cases where the sum in question originates in a contract of insurance, the dependants only require the assistance of the Act of 1908 if the resulting gain falls within the first three of the types of gain referred to above. If there was no probability or reasonable expectation

C that the sum would be received, the dependants would not be required to bring it into account. If, for example, an employer, anxious to guard against loss to himself by the accidental death of a skilled employee, takes out a policy of insurance but does not tell the employee or lead anyone to suppose that benefit may arise therefrom to the employee or his dependants, and then on the accidental death of the employee through the negligence of a third party decides

D from motives of generosity to pay the sum in question to the employee's widow, the third party could not contend that she should bring it into account in her claim against him. But she would primarily rely on the principle applied in *Peacock v. Amusement Equipment Co., Ltd.* (3) rather than the Act of 1908 to protect herself from reduction in compensation.

It is conceded by the defendant that the first two types of gain referred to

E previously are within the Act of 1908, and in my judgment it would have been a simple matter to include words limiting the scope of s. 1 to those two types, if that was Parliament's intention. On the other hand, if the intention was to include the first three types, there is no necessity to add to the language actually used. For these reasons I hold that the sum of £1,000, which the plaintiff either

F has received or is about to receive, is within the scope of s. 1 of the Act of 1908 and should not be subtracted from the agreed figure of £1,300.

In these circumstances it is tempting to follow the example set in *Bowskill v. Dawson* (1), and express no view on the two other contentions relied on by the plaintiff but as the case is of some importance and counsel pressed me to deal with these other contentions, I propose to do so in regard to one of them.

It was contended that in the present case, as in *Bowskill v. Dawson* (1), Mr. Green or his personal representatives had a right in equity to claim payment of the benefits set out in the schedule to the policy if an event occurred which rendered them payable. It was not, and in my view could not be, contended that there was anything in the present case which could fairly be regarded as comparable with the deed and the booklet which were the basis of the decision in

H *Bowskill v. Dawson* (1). It was said, however, that Mr. Russell did impose on himself an obligation enforceable in equity and constituted himself a trustee for employees included in the list of insured persons. Reliance was placed on the wording of the recital, the payment of the premiums year by year and the recognition by Mr. Russell's widow (the defendant) and her solicitors of an obligation to pay over to the plaintiff the sum received from the insurance

I company by reason of Mr. Green's death, evidenced by a letter dated June 16, 1955, from the defendant's solicitors to the plaintiff's solicitors. The wording of the recital is:

"Whereas the insured is desirous of securing payment of benefits as herein-after set forth to any insured person . . .",

and it is contended that on its true construction this language amounts to a declaration of trust on the part of Mr. Russell, the insured, in favour of the insured persons respectively of such payments as might be made under the policy.



Apart from this recital, there is in my judgment no evidence whatever that Mr. Russell himself intended to constitute himself a trustee of such payments. In *Re Schebsman, Ex p. Official Receiver* (4) ([1943] 2 All E.R. 768) LORD GREENE, M.R., said (*ibid.*, at p. 770):

"An examination of the decided cases does, it is true, show that the courts have on occasions adopted what may be called a liberal view on questions of this character. But in the present case, I cannot find in the contract anything to justify the conclusion that a trust was intended. It is not legitimate to import into the contract the idea of a trust when the parties have given no indication that such was their intention. To interpret this contract as creating a trust would, in my judgment, be to disregard the dividing line between the case of a trust and the simple case of a contract made between two persons for the benefit of a third."

And in the same case ([1943] 2 All E.R. at p. 779), DU PARCQ, L.J., said:

"It is true that, by the use possibly of unguarded language, a person may create a trust, as Monsieur Jourdain* talked prose, without knowing it, but unless an intention to create a trust is clearly to be collected from the language used and the circumstances of the case, I think that the court ought not to be astute to discover indications of such an intention."

There is also a passage to the same effect (which I mention but do not set out) in the judgment of LORD WRIGHT in the Privy Council in *Vandepitte v. Preferred Accident Insurance Corp'n. of New York* (5) ([1932] All E.R. Rep. 527 at p. 533). Although the point is not conclusive, it is to be noted that the recital is part of a printed form and the language is that of the insurance company rather than that of Mr. Russell or his legal advisers. Moreover, the language is at least consistent with a desire on his part to secure, that is, make sure, that there was money available to meet claims against him by any of his employees included in the list of insured persons, in the event of his own finances being insufficient.

As was pointed out by counsel for the defendant, a good intention does not of itself create a trust, and even if it were right to infer that if Mr. Russell had survived he would not have wished to retain for himself the sum of £1,000 received in respect of Mr. Green's death, it is none the less true that a moral obligation is no basis for asserting an enforceable trust. Reference was made to a number of reported cases, but apart from *Bowskill v. Dawson* (1) ([1954] 2 All E.R. 649) and *Prudential Staff Union v. Hall* (6) ([1947] K.B. 685) there was no close parallel to the present case, so far as this issue is concerned, and for that reason I refrain from citing them. In both the cases just mentioned there was ample material to justify the allegation of a trust. In my judgment, the plaintiff has failed to discharge the burden of satisfying me that a trust was created, and if the claim had depended on her doing so, it would have failed.

The third ground on which the claim was put forward involved the contention that at common law, although Mr. Green was not a party to the contract of insurance, he would have been entitled to claim under it, and that accordingly his mother, the plaintiff, is equally so entitled. Support for this contention is to be found in the judgments of DENNING, L.J., in *Smith v. River Douglas Catchment Board* (7) ([1949] 2 All E.R. 179) and in *Drive Yourself Hire Co. (London), Ltd. v. Strutt* (8) ([1953] 2 All E.R. 1475), and possibly in the judgment of DEVLIN, J., in *Pyrene Co., Ltd. v. Scindia Steam Navigation Co., Ltd.* (9) ([1954] 2 All E.R. 158). Since this contention raises an issue on which legal opinion is divided and

* A character in Molière's comedy *Le Bourgeois Gentilhomme*.

A no decision regarding it is required in the present case, I prefer to take refuge in silence. The point is open to the plaintiff in the event of an appeal.

The result is that there must be judgment for the plaintiff for the agreed sum of £1,300.

Judgment for the plaintiff.

B Solicitors: *Abbott, Baldwin & Co.* (for the plaintiff); *Greenwoods* (for the defendant).

[Reported by WENDY SHOCKETT, Barrister-at-Law.]

C

D

NOTE.

WINCHESTER v. FLEMING.

[COURT OF APPEAL (Jenkins, Parker and Pearce, L.JJ.), July 7, 8, 9, 10, 11, 14, 15, 16, 17, 1958.]

E The defendant appealed from the decision of *DEVLIN, J.* (reported [1957] 3 All E.R. 711), in an action wherein the plaintiff claimed damages for breach of an agreement compromising an earlier action between the parties. The breaches alleged included (i) that the defendant had financed the plaintiff's husband in prosecuting a petition for a decree of nullity of marriage and (ii) that the defendant harboured the plaintiff's husband against the will of the plaintiff. The case was reported at [1957] 3 All E.R. 711 solely on issue (ii), the question of harbouring. *DEVLIN, J.*, found that the defendant was in breach of the agreement on issue (i), inferring from the evidence that she had financed the petition. The COURT OF APPEAL allowed the defendant's appeal on the ground that there was nothing in the evidence to justify that inference. The judgment of the court, delivered by *PARKER, L.J.*, did not touch on the question of harbouring beyond mentioning that *DEVLIN, J.*, had held that the defendant had not harboured the plaintiff's husband against her will. No cross-notice of appeal was served by the plaintiff, and the sole question before the Court of Appeal was whether the learned judge had been right in holding that the defendant had financed the husband in the prosecution of his petition.

G

[Reported by HENRY SUMMERFIELD, Esq., Barrister-at-Law.]

JOSEPH v. NATIONAL MAGAZINE CO., LTD.

[CHANCERY DIVISION (Harman, J.), June 19, 20, 23, 24, July 9, 1958.]

Press and Printing—Contract for publication of signed article in magazine—Article written to enhance author's reputation as connoisseur of jade—Changes on manuscript in the course of editing it—Refusal of author to consent to changes—Refusal to permit publication in amended form—Whether contract repudiated—Whether publishers liable for breach of contract.

Specific Performance—Contract to publish signed article—Article not written at date of contract—Refusal of publisher to print article as submitted.

The plaintiff and the defendant orally agreed for the publication in the defendant's magazine of an illustration of jade carvings acquired by the plaintiff (a dealer in antiques) and of an article relating to jade carvings written and signed by the plaintiff, who was an authority on that subject. The plaintiff was to pay for the cost of the illustration and to receive no payment for the article. The plaintiff submitted his article, but the defendant altered it considerably. The plaintiff objected to the alterations, and refused to permit publication of the article as amended either with or without his name. The defendant refused to publish the plaintiff's article without amendment. The plaintiff claimed specific performance of the contract, and damages. The defendant contended that by his conduct the plaintiff had repudiated the contract, and also counterclaimed for the cost of blocks prepared for the purpose of the illustration.

Held: (i) the plaintiff had not repudiated the contract because he was entitled to write his own article in his own style, expressing his own opinions, and was not bound to submit to have his name published as the author of a different article expressing other opinions in a different style.

(ii) the plaintiff could not be granted a decree of specific performance, because, while it was not necessary for the granting of a decree that the subject-matter should be in the plaintiff's possession or power at the date of the contract, the terms of the article were not agreed between the parties, and such a decree would involve supervision of the editing of the article by the court; but the plaintiff was entitled to damages for the loss of the opportunity of enhancing his reputation as an expert on jade.

Barrow v. Chappell & Co., Ltd. ((1951), 62 The Author, 2) distinguished.

(iii) the defendant was not entitled to be paid the cost of the blocks by the plaintiff, because the plaintiff's agreement to bear the cost of the illustration was conditional on its appearing in the magazine in connexion with his name.

[As to the rights between author, editor and publisher, regarding a manuscript, see 26 HALSBURY'S LAWS (2nd Edn.) 142, para. 284; and as to the publisher's liability for failure to publish, see *ibid.*, pp. 141, 142, para. 282; and for cases on the rights of publishers in regard to the alteration of manuscripts, see 37 DIGEST 541, 36-39.]

As to specific performance of a contract which would require continued supervision, see 31 HALSBURY'S LAWS (2nd Edn.) 333, 334, para. 365; and for cases on the subject, see 42 DIGEST 433, 434, 52-64.]

Case referred to:

(1) *Barrow v. Chappell & Co., Ltd.*, (1951), 62 The Author, 2.

Action.

The claim of the plaintiff in this action was that the defendant had broken an agreement with him whereby an article under his signature was to appear in a publication called "The Connoisseur", of which the defendant was proprietor. The plaintiff's primary claim was for specific performance of this agreement.

A By his statement of claim he alleged that he had been damaged by the defendant's default and asked for an inquiry as to damages. The statement of claim, however, did not pray expressly for damages for breach of contract, the damages mentioned being only damages in addition to specific performance or in lieu of it under Lord Cairns' Act. At the hearing, HARMAN, J., allowed the plaintiff to amend his prayer by adding a claim for damages for breach of contract.

B By its defence, the defendant admitted that there was an oral contract, though not precisely the contract pleaded by the plaintiff, and alleged that the plaintiff had by his conduct repudiated it. There was a counterclaim for certain expenses incurred by the defendant.

C The plaintiff was a dealer in antiques, who had made a speciality of jade carvings, in which he had been interested all his life, his father having been engaged in the like trade before him. It was not in dispute that he was a considerable authority on this subject. He had talked on it on the television, but had never written about it.

The defendant's magazine was founded in 1901 and occupied a prominent position in its own line.

D His LORDSHIP found that at the end of June, 1956, a Mr. Law, the advertising manager of the defendant, made a contract with the plaintiff for the publication in "The Connoisseur" of a full page illustration of two green jade plaques which the plaintiff had recently acquired, and a full page article written and signed by the plaintiff. This contract was confirmed in September, 1956, by Mr. Ramsey, the editor of "The Connoisseur". The plaintiff was to pay for the production of the illustration, and to receive no payment for the article.

E The plaintiff submitted his article, but soon afterwards submitted a fresh version, which Mr. Ramsey sent for revision to a Mr. Staal, who made considerable alterations. Before receipt of the proof, the plaintiff submitted a third version making small amendments to the second version, but this was (rightly, as His LORDSHIP held) ignored by the defendant, work having been begun on the earlier version.

F The plaintiff alleged that the article as revised by Mr. Staal and put into proof contained twenty-three errors of fact and also technical errors which did not appear in the plaintiff's manuscript. The defendant informed the plaintiff that it intended to publish the article as revised either with his name or without it. The plaintiff was unwilling to agree to either of these courses. The defendant refused to publish the article without amendment,

G and on Nov. 17, 1956, the plaintiff issued the writ in the present action.

F. E. Skone James for the plaintiff.

R. W. Goff, Q.C., and G. M. Parbury for the defendant.

Cur. adv. vult.

H July 9. HARMAN, J., read a judgment in which he stated the facts and reviewed the evidence and continued: In my judgment there was a contract made by Mr. Law with the plaintiff at the end of June and ratified by Mr. Ramsey at the beginning of September that a full-page illustration in colour of the plaintiff's plaques should appear in the editorial part of the magazine and that opposite should be a full-page article written and signed by the plaintiff. Now it appears that a page of "The Connoisseur" takes about a thousand words. The article

I tendered by the plaintiff contained some 1,220 words, and the plaintiff admits that it was within the competence of the editor to curtail the article so as to go on to a page. What the plaintiff denies is the defendant's right to have revisions made such as were here made by Mr. Ramsey and Mr. Staal, these including the title and the conclusion, a number of alterations of fact and, above all, stylistic alterations. In my judgment, the plaintiff was amply justified in refusing to allow to be published under his name and as his work the article as revised by Mr. Staal. I can see no justification for the contention that an editor may alter the matter and the manner of a signed article in this way. Style is,

I suppose, a matter of taste. Mr. Ramsey said that the plaintiff's article was not in "The Connoisseur" manner and he preferred Mr. Staal's production. For myself, I think that it was greatly inferior, being written in the kind of journalese which alters the words "before burial" to "prior to interment". However that may be, the plaintiff was entitled to write his own article in his own style, expressing his own opinions, and was not bound to submit to have his name published as the author of a different article expressing other opinions in a different style. "Le style est l'homme même" as Buffon says. In my judgment, therefore, the plaintiff did not repudiate the contract. It is true that the plaintiff is not a professional writer and that it was his reputation as a connoisseur on jade which he wished to enhance; but, having regard to the contract made, he was entitled to do this in his own way. A B

It remains to consider what remedy the plaintiff is entitled to have. He claims specific performance, but it is not his wish to have the article of Sept. 18 (the second version) published as it stands, but to have it published with the small corrections included in the third version, that of Sept. 26, so that there never was an agreed subject-matter for publication. The plaintiff sought to pray in aid an unreported case of *Barrow v. Chappell & Co., Ltd.* (1) ((1951), 62 The Author, 2), decided by DANCKWERTS, J., in which specific performance was decreed for the publication of a piece of music, but in that case the music had been composed and performed on more than one occasion before the agreement was made and the defendants offered in court to publish the music if the judge found there was a contract. This is a very different case. There never was, as I pointed out, a specific article which the defendant agreed to publish. The defendant argued that there was no mutuality because at the time that the contract was made the subject-matter of the contract was not in existence and the defendant could not have compelled the plaintiff to write the article. As to this, I am of opinion that it is not essential that the subject-matter of the contract should be in the plaintiff's possession or power when the contract is made. It is enough if he is able to produce it before the date when performance is due. This at least is true of a chattel. In this case, however, the exact terms of the article were never agreed on between the parties, and the court would be called on to supervise the editing of the article, whether that of Sept. 18 or of Sept. 26, by any necessary curtailment or correction of mistakes or possibly grammatical changes which an editor may legitimately make. In my judgment, therefore, this is not an agreement of which specific performance can be ordered by the court. C D E F G

There remains the question of damages. As to this, the defendant argues that publicity being all that the plaintiff sought, he could have had all the publicity he wanted if he had agreed to Mr. Staal's article going out under his name, and therefore nominal damages only can be awarded. I do not accept this. The plaintiff's object was not to advertise his plaques, but to enhance his own reputation as an expert on jade, and this, as I have said, he was entitled to do within reasonable limits in his own way. Indeed, I cannot but think that he was justified in his notion that Mr. Staal's article published under his name would not be a help to him but the reverse. The quantum of damage in such a case is and must remain more or less a matter of guesswork. It would undoubtedly be a feather in the plaintiff's cap to have a signed article published in the editorial pages of this magazine. He has lost that advantage. The measure of damage is not susceptible of accurate assessment. I see no object in sending the question to inquiry, for I do not think that any evidence would help towards quantifying it. In the absence of a jury, I must do the best I can, and I assess the damages at £200, for which sum there will be judgment for the plaintiff. In addition, he is entitled as special damage to the amount he expended on having the photograph taken, which was fifteen guineas. H I

As to the counterclaim, the defendant, in accordance with the contract, had

A the blocks made for the purpose of illustrating the plaques, and this cost £57 0s. 9d., and it is argued that this sum must be set off against the damage awarded to the plaintiff. In my judgment, this is not so. The plaintiff's promise to defray this expense was conditional on the illustration appearing in the magazine with his name attached to it. Owing to the defendant's breach of contract, this has not come about. If the plaintiff had paid for the production of the blocks, he could, in my judgment, have recovered that sum in addition to the cost of the photograph. As he has not been at this expense, he cannot recover it; but, in my judgment, neither can the defendant. I dismiss the counterclaim with costs.

Judgment for the plaintiff for £215 15s.; counterclaim dismissed.

C Solicitors: *Drury, Hopgood & Co.* (for the plaintiff); *Frederick Wills & Co.* (for the defendant).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

D

PRESCOTT (orse. FELLOWES) v. FELLOWES.

E [COURT OF APPEAL (Hodson, Romer and Sellers, L.JJ.), May 16, 19, July 14, 1958.]

Variation of Settlement—Ante-nuptial settlement—Deed made in consideration of marriage containing covenant to transfer securities as absolute gift immediately after marriage—Transfer of securities to husband accordingly—Whether ante-nuptial settlement—Matrimonial Causes Act, 1950 (14 Geo. 6 c. 25), s. 25.

F

A deed, dated June 19, 1953, and indorsed "Settlement on marriage", contained a clause providing that: "[The wife] will immediately after the solemnisation of the said marriage transfer to [the husband] as an absolute gift unaffected by anything hereinafter contained" specified securities valued at £15,000. Clause 2 provided for a loan of £20,000 by the wife to the husband if he became a member of Lloyd's within a prescribed time, that amount being intended to make up the sum of £35,000 required for that purpose. Interest on the £20,000 was to be paid by the husband if demanded by the wife. The parties were married the following day, and the specified securities were transferred to the husband in pursuance of the deed. The husband did not become a member of Lloyd's within the prescribed time, however, with the result that the provisions with respect to the loan ceased to be operative at the end of 1955. On Jan. 28, 1958, the marriage was dissolved by decree absolute. The wife applied to the court for an order varying the deed as an ante-nuptial settlement under s. 25 of the Matrimonial Causes Act, 1950.

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Held: no order varying the deed could be made because the transfer of securities as an outright gift was a completed transaction involving no subsequent periodical payments, and at the date of the decree nisi there was therefore no ante-nuptial settlement under the section, although (*semble*) there would have been an ante-nuptial settlement if the loan had been carried into effect.

Hubbard v. Hubbard ([1901] P. 157) and *Bosworthick v. Bosworthick* ([1927] P. 64) followed.

Smith v. Smith ([1945] 1 All E.R. 584), and *Halpern v. Halpern* ([1951] 1 All E.R. 315) criticised. A

Per ROMER, L.J.: no absolute disposition of property in favour of a spouse, whether made for consideration or not, not being a provision in the nature of periodical payments, can be treated as a "settlement" for the purposes of s. 25 of the Matrimonial Causes Act, 1950; and property comprised in such a disposition is therefore not "property settled" with reference to which an order under the section can be made (see p. 65, letter D, post). B

Decision of STEVENSON, J. ([1958] 1 All E.R. 824) reversed.

[As to settlements within the statutory power to vary ante-nuptial or post-nuptial settlements, see 12 HALSBURY'S LAWS (3rd Edn.) 451, 452, paras. 1015 and 1016, note (q); and for cases on the subject, see 27 DIGEST (Repl.) 646-648, 6097-6106. C

For the Matrimonial Causes Act, 1950, s. 25, see 29 HALSBURY'S STATUTES (2nd Edn.) 412.]

Cases referred to:

- (1) *Dormer (otherwise Ward) v. Ward*, [1901] P. 20; 69 L.J.P. 144; 83 L.T. 556; 27 Digest (Repl.) 648, 6100. D
- (2) *Jacobs v. Jacobs*, [1942] 2 All E.R. 471, 473; [1943] P. 7; 111 L.J.P. 98, 99; 167 L.T. 386; 27 Digest (Repl.) 642, 6041.
- (3) *Worsley v. Worsley & Wignall*, (1869), L.R. 1 P. & D. 648; 38 L.J.P. & M. 43; 20 L.T. 546; 27 Digest (Repl.) 245, 1980.
- (4) *Chalmers v. Chalmers*, (1892), 68 L.T. 28; 27 Digest (Repl.) 645, 6089.
- (5) *Hubbard (otherwise Rogers) v. Hubbard*, [1901] P. 157; 70 L.J.P. 34; 84 L.T. 441; 27 Digest (Repl.) 645, 6090. E
- (6) *Bosworthick v. Bosworthick*, [1927] P. 64; 95 L.J.P. 171; 136 L.T. 211; 27 Digest (Repl.) 645, 6091.
- (7) *Melwill v. Melwill & Woodward*, [1930] P. 159; 99 L.J.P. 65; 143 L.T. 206; 27 Digest (Repl.) 646, 6095.
- (8) *Smith v. Smith*, [1945] 1 All E.R. 584; 114 L.J.P. 30; 173 L.T. 8; 27 Digest (Repl.) 647, 6101. F
- (9) *Brown v. Brown*, [1936] 2 All E.R. 1616; [1937] P. 7; 105 L.J.P. 103; 155 L.T. 418; 27 Digest (Repl.) 646, 6099.
- (10) *Halpern v. Halpern*, [1951] 1 All E.R. 315; [1951] P. 204; 27 Digest (Repl.) 648, 6106. G
- (11) *Parrington v. Parrington*, [1951] 2 All E.R. 916; 27 Digest (Repl.) 648, 6105.
- (12) *Hindley v. Hindley*, [1957] 2 All E.R. 653; 3rd Digest Supp.

Appeal.

The husband appealed by leave against an order of STEVENSON, J., made on Mar. 14, 1958, and reported [1958] 1 All E.R. 824, whereby he found and adjudged that a gift of £15,000 made by the wife to the husband on their marriage, referred to in a document indorsed "Settlement on marriage" and dated June 19, 1953, constituted an ante-nuptial settlement. STEVENSON, J., also ordered the husband to swear an affidavit as to what investments represented the assets under cl. 1 of the document and to account for the disposal of them and the proceeds of disposal and as to his means, and he ordered an inquiry to be held before a registrar. The grounds of appeal were that the judge was wrong in law in so finding, that he was wrong in law in finding that the gift constituted an ante-nuptial settlement, and that the finding was against the weight of the evidence. Alternatively, it was said that, if the gift was held to constitute an ante-nuptial settlement, the judge was wrong in law in ordering the husband to swear an affidavit and in holding that an inquiry should be held before a registrar. H
I

A *Gerald Gardiner, Q.C., P. R. Hollins and A. B. Ewbank for the husband.*
Roger Ormrod, Q.C., G. H. Crispin and T. A. C. Coningsby for the wife.

Cur. adv. vult.

July 14. The following judgments were read.

B **HODSON, L.J.:** This is an appeal from an order of STEVENSON, J., made on an application to vary the provisions of a deed, dated June 19, 1953, as an ante-nuptial settlement. The learned judge held that a gift made by the petitioner to the respondent in pursuance of the provisions of the deed was property settled by her on him within the meaning of s. 25 of the Matrimonial Causes Act, 1950.

C The marriage took place on June 20, 1953, and the deed is indorsed "Settlement on marriage". The marriage was dissolved by decree absolute on Jan. 28, 1958; and the wife has invoked the jurisdiction of the court conferred by s. 25. This section is the successor of earlier sections, the first of which is s. 5 of the Matrimonial Causes Act, 1859, but the alterations which have been made in the language of the section dealing with variation of settlements by the legislature from time to time do not affect the question under consideration in this case, which is whether there is here any jurisdiction to make an order. **D** Section 25 reads as follows:

E "The court may after pronouncing a decree for divorce or for nullity of marriage inquire into the existence of ante-nuptial or post-nuptial settlements made on the parties whose marriage is the subject of the decree, and may make such orders with reference to the application of the whole or any part of the property settled either for the benefit of the children of the marriage or of the parties to the marriage, as the court thinks fit, and the court may exercise the powers conferred by this section notwithstanding that there are no children of the marriage."

F The material date for the purposes of the inquiry is the date of the decree absolute of divorce. This has been established by the decision of the Court of Appeal when it was unsuccessfully argued that a settlement had come to an end at the moment of divorce in the one case and after the divorce in the other (see *Dormer (otherwise Ward) v. Ward* (1), [1901] P. 20; *Jacobs v. Jacobs* (2), [1942] 2 All E.R. 473).

G The first clause of the deed reads as follows:

"[The wife] will immediately after the solemnisation of the said marriage transfer to [the husband] as an absolute gift unaffected by anything hereinafter contained the securities short particulars of which are set out in the schedule hereto."

H The second clause provides for the advancement of £20,000 on loan by the wife to the husband; and para. 4 (which I need not read in full) deals with that loan, which was intended to make up, with the securities, the sum of £35,000 required by the husband to enable him to become a member of Lloyd's. There were provisions for payment of interest on the loan, and for repayment of the loan.

I On July 20, 1953, securities to the value of £15,000 were transferred to the husband in pursuance of the promise contained in para. 1 of the deed. The husband never became a member of Lloyd's before Dec. 31, 1955, or at all, and the subsequent provisions of the deed therefore ceased to have effect. The position at the date of the divorce was, therefore, that, whether or no the deed in question taken as a whole might be treated as an ante-nuptial settlement, the only property which could then be dealt with by the court as property settled was the £15,000 or the securities representing the same.

It is to be observed that the transfer of securities was expressed to be an absolute gift to the husband unaffected by anything thereafter contained in the

deed. It is not strictly accurate to describe the transaction as an absolute gift since it was made for good consideration, viz., marriage; but there was no settlement in the ordinary sense of the word as used by conveyancers. Nevertheless, it was argued by the wife that the section has been given a wide interpretation by the courts, who have long since departed from the view that the conveyancer's conception of a settlement is of any assistance in deciding the question. Accepting this contention as correct, some effect must nevertheless be given to the word "settled" in the Act of Parliament, and the courts have, as the authorities show, recognised that it is not to be given the same meaning as if all dispositions made by one spouse in favour of the other or by a third party in favour of a spouse had been expressly included in the section.

To show the wide interpretation given from earliest times to the language of the section, it is useful to refer to *Worsley v. Worsley & Wignall* (3) ((1869), L.R. 1 P. & D. 648 at p. 651). Here an ordinary deed of separation was treated as a post-nuptial settlement and varied accordingly. The language of LORD PENZANCE has had, I think, influence on subsequent decisions, and I quote a passage from his judgment (*ibid.*, at p. 651):

"The court would have a great difficulty in saying that any deed which is a settlement of property, made after marriage, and on the parties to the marriage, is not a post-nuptial settlement. It would not be justified in narrowing the reasonable scope of the words used in the section. The substance of the matter is, that the legislature by this section has armed the court with authority to make special arrangements in the case of a woman being found guilty of adultery, in reference to property settled upon her in her character as a wife. The substantial feature to bring the case within the clause of the statute is, that a sum of money is paid to a woman in her character as wife, or is settled upon her in that character and whilst she continues a wife."

The payments made to a spouse in his or her character as a spouse give to those payments the qualification of nuptial, but it does not follow that every payment made and every present given by one spouse to the other constitutes settled property. Were it so, highly inconvenient results would follow, which in some cases might seem to be absurd if, e.g., a spouse claimed the return of some trifling article of furniture given for the purpose of increasing the comfort or elegance of the matrimonial home. Wedding presents given by third parties would not necessarily be settled property, although given to the spouse in her character as a spouse, unless they had some characteristic which entitled them to be treated as settled property. Gifts, therefore, have been recognised by the courts as outside the scope of the section, with a qualification which will appear; see *Chalmers v. Chalmers* (4) ((1892), 68 L.T. 28), cited to, and approved by, the Court of Appeal in *Hubbard (otherwise Rogers) v. Hubbard* (5) ([1901] P. 157). In the former case an assignment of property by a wife to a husband while they were living together was held on a divorce not to be a settlement. In the latter case a husband executed a deed by which he assigned to a trustee a leasehold house and some furniture on trust to assign the same at once to the wife absolutely, and the trustee assigned the same accordingly. The judgment of RIGBY, L.J., agreed to by VAUGHAN WILLIAMS, L.J., and STIRLING, L.J., was as follows (*ibid.*, at p. 160):

"In my opinion the decision of the learned President that this deed is a settlement within the meaning of s. 5 of the Matrimonial Causes Act, 1859, cannot be supported, for the plain reason that the deed is not a settlement at all. If we were inquiring whether the deed ought to be set aside under s. 47 of the Bankruptcy Act, 1883, different considerations would arise—considerations which are wholly irrelevant on the present occasion. I am inclined to say that the decision of the learned President himself in *Chalmers*

A *v. Chalmers* (4) is directly in point, and is to be preferred to his decision in the present case. I do not, however, rest my decision upon *Chalmers v. Chalmers* (4) as an authority; I base it upon the general ground that this deed is not a 'settlement' in any sense, and cannot therefore be a settlement within s. 5."

B This decision is binding on this court and unless it can be validly distinguished is in my opinion conclusive in favour of the husband.

Some difficult questions have no doubt arisen where, even though there is an absolute gift, yet the courts, again giving a wide interpretation to the section, have found a settlement to be in existence at the material date. Such a case was envisaged by SIR FRANCIS JEUNE, P., during the argument in *Chalmers v. Chalmers* (4), when he said (68 L.T. at p. 29): "Supposing the wife made him a present of an annuity, that would not be a settlement": This question fell for decision in *Bosworthick v. Bosworthick* (6) ([1927] P. 64). There a bond had been executed by a wife securing to her husband an immediate annuity of £300 for his life. On the dissolution of the marriage, the wife applied for an order extinguishing her liability under the bond. It was unsuccessfully argued on behalf of the husband that the giving of this bond was not a settlement by the wife on the husband, and accordingly the court gave the answer to the question earlier posed by SIR FRANCIS JEUNE different from the one which in *Chalmers v. Chalmers* (4) he had been inclined to give. In reaching its decision the court expressly based itself on an earlier decision of the Court of Appeal in *Dormer v. Ward* (1), where the Court of Appeal held that a covenant to pay a yearly sum constituted settled property, the disposition of which could be varied under the Act empowering the courts to vary settlements. The court there rejected the argument that the covenant contained in the settlement under consideration merely constituted a debt and was not property settled on the petitioner.

F In *Bosworthick v. Bosworthick* (6) the Court of Appeal treated the bond as on the same footing as the covenant in *Dormer v. Ward* (1). LORD HANWORTH, M.R., said ([1927] P. at p. 69):

"Following upon a number of other decisions, there is *Dormer v. Ward* (1) in this court, which was an application to vary a settlement comprising a covenant by the husband to pay a yearly sum of £200 to the wife during their joint lives. Mr. Hewitt says that the door was open in that case to vary the covenant, because there was also settled property included in the settlement. With regard to the covenant to pay the annuity, it was contended that there was no settlement except by the owner of a limited estate subject to powers; that there was a great distinction for that purpose between property and power; and that the covenant for payment of the £200 per annum merely created a debt, and was not property settled upon the wife who was the petitioner. In dealing with that contention—and it is quite plain from the report that the court dealt seriatim with the liabilities under the settlement—VAUGHAN WILLIAMS, L.J., said ([1901] P. at p. 34): 'It seems to me that the right, and the only right, of the petitioner in respect of this covenant is to apply to the court under s. 5 to make an order for the application of this £200 for her benefit. This, of course, is pro tanto to vary the settlement, because, unless there was a valid marriage, she, in my judgment, is not entitled to the benefit of the covenant. She could not recover on the covenant unless varied, but I think, for reasons which I have already given, that the court in case of a decree of nullity can and ought to vary the settlement, treating for the purpose of the order that which was no marriage as if it had been a valid marriage, and make the order for application for the benefit of a woman not a wife of this yearly sum of £200.'"

That is the end of the quotation from VAUGHAN-WILLIAMS, L.J.'s judgment.

Continuing LORD HANWORTH's judgment, the Master of the Rolls said ([1927] A P. at p. 70):

"It is quite clear, therefore, that the court dealt with that covenant separately, and although the jurisdiction of the court was contested, yet the court held that it had power to deal with the covenant. That decision has the greater authority because the case had already been before GORELL BARNES, J., in the court below, and he had decided that 'property settled' within the meaning of s. 5 of the Act of 1859 and s. 3 of the Act of 1878 referred only to that particular property the benefit of which was, by the marriage settlement, conferred in the ordinary way on the parties or their children, and he had rejected jurisdiction in respect of the covenant. He appears to have taken the view that the covenant merely created a debt, and that he ought not to make an order dealing with it. But on appeal, in spite of the argument urged in support of the decision in the court below, the Court of Appeal held that it had jurisdiction to deal with the covenant apart from the settlement, and if we were to hold that there was no jurisdiction in the present case, I think that we should be running counter to the decision of this court in *Dormer v. Ward* (1), which we cannot do."

The learned Master of the Rolls, LORD HANWORTH, pointed out that this was a case where payments had to be made by one spouse to the other in the character of a spouse.

The matter was put very clearly by ROMER, J., where he said ([1927] P. at p. 72):

"We have had numerous authorities cited to us going as far back as 1861, and amongst them an authority which is binding on this court, and in my judgment those authorities establish that where a husband has made a provision for his wife, or a wife for her husband, in the nature of periodical payments, that amounts to a settlement within the meaning of the sections. That may appear to be a very liberal construction of the sections, but I think that it is no more liberal a construction than should be given to them having regard to the obvious purposes for which they were enacted by the legislature."

This judgment of ROMER, J., was quoted in extenso in a later case, *Melville v. Melville & Woodward* (7) ([1930] P. 159 at p. 172), where a settlement executed by a wife with the object of excluding her then husband from any interest in certain property was held nevertheless to be within the ambit of the section. This case has a bearing on the present as showing that the motive in entering into the settlement is irrelevant, as ROMER, L.J., there pointed out (*ibid.*, at p. 179).

In the present case the motive of the wife may well have been to give her husband the chance of becoming a member of Lloyd's by giving him £15,000 and lending him £20,000, the total sum required by the committee of Lloyd's. The motive being immaterial, one must look at the deed to see what was done, and here one finds only a transfer of securities as a completed transaction involving no periodical payments to be made thereafter. A qualification must therefore be made when one speaks of gifts out and out, or uses similar language, whether payments by one spouse to the other are expressed to be made in consideration of marriage or not. If there are periodical payments still to be made (as in *Bosworthick v. Bosworthick* (6)) at the time when the court has to inquire into the existence of the settlement, then, provided the nuptial element is present, there can be a settlement, or, to put it more accurately, there remains "property settled". I can find no other principle in the authorities which helps to draw the dividing line between gifts by one spouse to the other or payments made in consideration of marriage on the one hand which are not settled property and settled property on the other hand.

A This principle was followed by DENNING, J., in *Smith v. Smith* (8) ([1945] 1 All E.R. 584), who held, in the circumstances of the case before him, that a house held by husband and wife as joint tenants was continuing provision for the future needs of the wife in her character as wife. He did however appear, in applying the principle, to give there a wider application thereof than the authorities warrant, and indeed himself recognised the difficulty which the authority of the

B Court of Appeal had put in his way, as the following passage (*ibid.*, at p. 586) shows:

C "I find it difficult to reconcile the decisions in *Hubbard v. Hubbard* (5) and *Brown v. Brown* (9) ([1936] 2 All E.R. 1616), with the principle that runs through the rest of the cases on this subject. That principle, as I understand it, is that where a husband makes a continuing provision for the future needs of his wife in her character as a wife, which is still continuing when the marriage is dissolved, the provision is a 'settlement' which can be brought before the court to see whether the provision should continue now that she has ceased to be a wife. The same applies to a provision by a wife for her husband or by each or either for both. The

D provision usually takes the form of periodical payments either with the intervention of trustees as in an ordinary marriage settlement, or without them as in a separation deed or a bond; but it may take other forms. The transfer of an investment into a wife's name whether it be a house or shares, or an annuity, seems to me to be in its nature just as much a continuing provision for her future needs as is a periodical payment. The fact

E that it is made for no consideration other than natural affection and is in that sense a gift does not mean that it is not a 'settlement'."

He then went on to refer to *Bosworthick v. Bosworthick* (6).

I respectfully agree with him in finding the case of *Brown v. Brown* (9), which was decided in the opposite way, difficult to reconcile with the principle

F which I extract from what was said by the Court of Appeal in *Bosworthick v. Bosworthick* (6), for there was in *Brown v. Brown* (9) a continuing provision by way of periodical payments existing at the time of decree in the form of an annuity secured by deed in favour of the husband, the annuity having been purchased by the petitioning wife for that purpose. DENNING, J.'s wide application of the principle in *Smith v. Smith* (8) was followed by COLLINGWOOD, J., in *Halpern v. Halpern* (10) ([1951] 1 All E.R. 315), but I confess that in my

G opinion it appears that both those cases went beyond the latitude which the authorities have conferred in the liberal interpretation of the words "property settled" in the section.

The principle which I have endeavoured to state was expressly followed by PEARCE, J., in *Parrington v. Parrington* (11) ([1951] 2 All E.R. 916). He said

H (*ibid.*, at p. 920):

"... in the case before me the wife will, for some years to come, have to make payments under the bond ..."

Similarly, in this case, if the loan transaction in connexion with the £20,000 had been carried into effect, it would be difficult to say that there was no

I "property settled" while any of the interest payments were outstanding. The same principle was applied by DAVIES, J., who, in *Hindley v. Hindley* (12) ([1957] 2 All E.R. 653), held provisionally on an interlocutory application that two sums of money paid to a wife by a husband, one before and one after marriage, were not "property settled." He arrived at this conclusion (*ibid.*, at p. 659), saying:

"There is, as I can see it, no element of periodicity either with regard to the £45,000 (which strikes me I confess as something more in the nature of

a present to a mistress than anything else) nor in the case of the £68,000. And when one asks in regard to each transaction whether anything remains to be done or whether it is over and done with, the answer, as I think, is that it is over and done with."

In conclusion, I should state that, although by her original application the wife claimed that the husband should, whatever had happened to the gift of securities, in any event pay the sum of £15,000 representing the value of those securities, this application was not persisted in before the registrar who conducted the inquiry in this case, nor is it proceeded with now. It would seem that the result of this case is of mere academic interest if the husband is right in maintaining that the original securities have long since been sold and the proceeds mixed with his other moneys. I would allow the appeal.

ROMER, L.J.: By the deed which is in question on this appeal, and which the wife and the husband executed on and in consideration of their marriage, two objects were effected. It may be that in the minds of the parties these purposes were to some extent interconnected. On the face of the deed itself, however, each object had an independent legal existence. The first object was to assign to the husband for his own absolute use and benefit certain securities of the value of some £15,000 which belonged to the wife. The second purpose of the deed was to impose on the wife a contingent obligation to grant to the husband a loan of £20,000. The agreement to transfer the securities was contained in cl. 1 of the deed. The transfer was described by this clause as "an absolute gift", which it was not, because it was supported by the marriage consideration. The intention of the parties, however, in relation to the securities is quite clear, namely, that they were to pass into the absolute and unqualified ownership of the husband. The rest of the deed is taken up with the conditions on which the loan was to be granted. The object of the loan was to enable the husband to become a member of Lloyd's, if he became qualified in other respects for such membership before Dec. 31, 1955. If the loan became payable, the wife could not require repayment thereof during the husband's membership of Lloyd's, and so long as the provisions of the deed were observed save (as was later provided in the deed) through the medium of an endowment policy of assurance, which the husband was to effect on becoming a member. The loan was to bear interest at the rate of five per cent. per annum, but such interest was not to be payable unless demanded by the wife or unless the parties ceased to be treated as living together for the purposes of income tax and should become separately assessable therefor.

Inasmuch as the deed vested no property in trustees and created no successive legal or beneficial interests it had none of the attributes of a settlement which are familiar to conveyancing practitioners. It has, however, long since been established by decisions which are binding on this court that a disposition of property may constitute a "settlement" for the purposes of s. 25 of the Matrimonial Causes Act, 1950, notwithstanding that it would not be regarded as a settlement of property for any other purpose. The liberality with which this legislation has been construed is sufficiently exemplified by *Bosworthick v. Bosworthick* (6) ([1927] P. 64). In that case a wife executed, a few years after her marriage, a bond which secured to her husband an annuity for his life. The marriage was dissolved in 1925 and the wife applied to the court for an order extinguishing her liability under the bond. This court, affirming the decision of LORD MERRIVALE, P., held that the bond was a post-nuptial settlement for the purposes of s. 5 of the Matrimonial Causes Act, 1859, and s. 192 of the Supreme Court of Judicature (Consolidation) Act, 1925; and the wife's application succeeded. In the course of his judgment ROMER, J., who was sitting as a member of this court, said (*ibid.*, at p. 72) that the authorities established

"... that where a husband has made a provision for his wife, or a wife

- A for her husband, in the nature of periodical payments, that amounts to a settlement within the meaning of the sections. That may appear to be a very liberal construction of the sections, but I think that it is no more liberal a construction than should be given to them having regard to the obvious purposes for which they were enacted by the legislature."
- B In view of that and other decisions it seems to me (though it is not necessary to decide the point) that the deed now in question may have constituted an ante-nuptial settlement for relevant purposes on, and for some time subsequent to, its execution. This view is founded on the provisions of the deed which related to the loan. If the marriage had turned out successfully and if the husband had become qualified for membership of Lloyd's at any time up to
- C Dec. 31, 1955, the wife was liable under her covenant to provide the loan, the husband would have been liable to pay interest on it if called on to do so, and he (the husband) would have been provided with an income, some of which, presumably, would have gone towards the upkeep of the matrimonial home. It seems to me that the mutual obligations of husband and wife imposed by the deed and the payments to be effected thereunder might fairly have been regarded
- D as "settled property", by analogy to the wife's bond to secure an annuity for the husband which was treated as settled property in *Bosworthick v. Bosworthick* (6). The question, however, is immaterial, because the husband never did become a member of Lloyd's and accordingly all the provisions of the deed which related to the loan became entirely nugatory on Jan. 1, 1956.
- E Section 25 of the Act of 1950 provides in effect that on the dissolution of a marriage the court may inquire into the existence of ante-nuptial or post-nuptial settlements made on the spouses and may make such orders as are therein mentioned with reference to the application of the whole or any part of the property settled. The questions in the present case would accordingly appear to be: (i) was there in existence at the date of the decree absolute an ante-nuptial settlement made on the wife and the husband; and (ii) if so, was there any
- F "property settled" on which an order under s. 25 could operate?
- G In my judgment, both these questions quite clearly require a negative answer. In so far as the deed of June 19, 1953, might originally have been regarded as an ante-nuptial settlement for the purposes of s. 25 by reason of the provisions relating to the loan, those provisions had ceased to have any effect at all nearly two years previous to the decree nisi. So far as the loan was concerned, therefore,
- H there was no "settlement" at the date of the decree, nor was there anything on which the court could lay hold as constituting settled property. It was argued before us, however (and the argument found favour with the registrar and with the learned judge), that the assignment of the securities by the wife to the husband rendered the deed an ante-nuptial settlement for the purposes of s. 25 and that the securities themselves, or any other assets in the hands of the husband which represented the proceeds of the securities at the date of the decree, were "property settled" with reference to which an order could be made.
- I It would seem to me, even in the absence of authority, that an out and out and unqualified transfer of property by one spouse to the other cannot be regarded as a "settlement" of that property for any purpose whatever. It is indeed the very antithesis of a settlement and, widely though s. 25 and its predecessors have been construed by the courts, the expressions "settlement" and "property settled" do in fact appear in the section and cannot be wholly ignored. In any case, the point appears to me to have been decided by this court adversely to the wife in *Hubbard v. Hubbard* (5) ([1901] P. 157). In that case a husband assigned by deed to a trustee a leasehold house and some furniture on trust to assign the same at once to the wife absolutely; which the trustee accordingly did. The marriage was subsequently dissolved and this court held that the assignment was not a "settlement" within s. 5 of the Matrimonial Causes

Act, 1859, and that the court therefore had no jurisdiction to vary its provisions. **A**
RIGBY, L.J., in delivering the judgment of the court, said (*ibid.*, at p. 160) that
 the decision of **SIR FRANCIS JEUNE, P.**, that the deed was a settlement within
 the meaning of s. 5 could not be supported "for the plain reason that the deed
 is not a settlement at all." Then, after referring to a previous decision of the
 President in *Chalmers v. Chalmers* (4) ((1892), 68 L.T. 28) which the lord justice **B**
 said appeared to be directly in point and which was to be preferred to the
 decision under appeal, the lord justice proceeded ([1901] P. at p. 161):

"I do not, however, rest my decision upon *Chalmers v. Chalmers* (4) as
 an authority; I base it upon the general ground that this deed is not a
 'settlement' in any sense, and cannot therefore be a settlement within s. 5."

It is true that the assignment in *Hubbard v. Hubbard* (5) was a gift, whereas **C**
 the transfer of securities by the wife to the husband in the present case was
 made in consideration of marriage, but I can see no difference in principle between
 the two cases. The decision in *Hubbard v. Hubbard* (5) did not rest on the fact
 that the house and furniture there in question were a gift by husband to wife
 but on the out and out nature of the disposition; and the transfer of securities **D**
 in the present case was precisely of that nature. The transfer was absolute and
 unrestricted, and after it had been effected the husband could not have been
 restrained, either at law or in equity, from disposing of the securities in any
 manner he thought proper. Accordingly, on the principle of *Hubbard v. Hubbard*
 (5), the deed now in question was not a "settlement" for the purposes of s. 25
 in relation to the transferred securities, nor were the securities at any time, nor **E**
 are they now, nor are any traceable assets now representing them, "settled
 property" with reference to which an order could be made under the section.

I am aware that there is authority which, if applied to the present case, would
 lead to a different result. In *Smith v. Smith* (8) ([1945] 1 All E.R. 584) a husband
 bought a freehold house and had it conveyed to himself and his wife as joint
 tenants on trust for sale, and the conveyance provided that the husband and **F**
 wife should be beneficially entitled as joint tenants to the proceeds of sale of
 the house and to the net rents and profits thereof until sale. The effect of this
 was to constitute a gift by the husband to the wife of a joint beneficial interest
 in the property. Later the marriage was dissolved on the petition of the husband
 and he applied to the court under s. 192 of the Supreme Court of Judicature
 (Consolidation) Act, 1925, on the footing that, as the house was bought for the
 future benefit of both spouses, the conveyance was a post-nuptial settlement for **G**
 the purposes of the section. **DENNING, J.**, acceded to the application and in the
 course of his judgment said (*ibid.*, at p. 586) that

"where a husband makes a continuing provision for the future needs of
 his wife in her character as a wife, which is still continuing when the marriage
 is dissolved, the provision is a 'settlement' which can be brought before **H**
 the court to see whether the provision should continue now that she has
 ceased to be a wife. The same applies to a provision by a wife for her
 husband or by each or either for both."

The learned judge then stated that such provision usually takes the form of
 periodical payments but it might take other forms, and proceeded (*ibid.*): **I**

"The transfer of an investment into a wife's name whether it be a house
 or shares, or an annuity, seems to me to be in its nature just as much a
 continuing provision for her future needs as is a periodical payment. The
 fact that it is made for no consideration other than natural affection and
 is in that sense a gift does not mean that it is not a 'settlement'."

In *Halpern v. Halpern* (10) ([1951] 1 All E.R. 315) a wife, for no stated con-
 sideration, conveyed a half share in a freehold property which belonged to her,

A but which was not the matrimonial home, to her husband. Subsequently the wife divorced the husband and applied for the deed of conveyance to be varied as constituting a post-nuptial settlement within the meaning of s. 192 of the Supreme Court of Judicature (Consolidation) Act, 1925. COLLINGWOOD, J., after reviewing the relevant authorities, came to the conclusion that the case came within the test laid down by DENNING, J., in *Smith v. Smith* (8). At the end of

B his judgment the learned judge said ([1951] 1 All E.R. at p. 320):

“The conveyance by the wife to the husband was for the purpose of making a provision for him, not, it is true, in respect of the matrimonial home, but of a ‘house’, and I do not think that when DENNING, J., speaks of a ‘house’ that that is restricted to the matrimonial home. It was, I

C think, a conveyance by the wife to the husband because he was her husband, and with a view to the continuance of the matrimonial relations between them, and constituted a ‘settlement’ which can be brought before the court to decide whether the provisions thereof should continue now that he has ceased to be her husband.”

D In my opinion the decisions in *Smith v. Smith* (8) and *Halpern v. Halpern* (10) go further than is warranted by the decision of this court in *Hubbard v. Hubbard* (5). In my judgment the result of the decisions of this court in *Hubbard v. Hubbard* (5) and in *Bosworthick v. Bosworthick* (6) is that no absolute disposition of property in favour of a spouse, whether made for consideration or not, and not being a provision in the nature of periodical payments, can be treated as a

E “settlement” for the purposes of s. 25 of the Act; from which it follows, of course, that the property comprised in such a disposition is not “property settled” with reference to which an order under the section can be made.

Counsel for the wife sought to escape from this conclusion in the present case by suggesting that the securities were intended by both the spouses to be part and parcel of the total sum of £35,000 which was necessary to enable the husband to become a member of Lloyd’s. Perhaps a sufficient answer to this contention

F is that, if the securities had been intended to form part of the £35,000, they could not have been transferred to the husband at all, for he never did become a member of Lloyd’s. But in any case it is just as clear on the face of the deed that the securities were to be passed into the sole beneficial ownership of the husband as it is that the £20,000, had it become payable, would have been a loan to the husband and nothing more.

G I agree that the appeal should be allowed.

SELLERS, L.J.: I agree; and I have nothing to add to the reasons of my Lords.

Appeal allowed. Leave to appeal to the House of Lords refused.

Solicitors: *P. R. Kimber*, agent for *Norman S. Caney*, Putney (for the husband); *Culross & Co.* (for the wife).

[Reported by **F. A. AMIES, Esq., Barrister-at-Law.**]

SCOTTISH CO-OPERATIVE WHOLESALE SOCIETY, LTD. *v*
MEYER AND ANOTHER.

[HOUSE OF LORDS (Viscount Simonds, Lord Morton of Henryton, Lord Keith of Avonholm and Lord Denning), June 9, 10, 11, 13, 16, 17, 18, 19, 23, 24, July 24, 1958.]

Company—Oppression—Subsidiary company—Use of controlling powers by majority shareholder to destroy company's business—Oppression of minority shareholders—Order for purchase by majority shareholder of minority shareholders' shares—Companies Act, 1948 (11 & 12 Geo. 6 c. 38), s. 210 (1), (2).

The appellants, owners of a weaving mill, and the respondents, who formerly were German nationals, started in 1947 the manufacture of rayon cloth, which the appellants had not previously manufactured. The respondents, who provided the formulae, knowledge and experience, had extensive connexions in Europe in the trade and obtained licences for the purchase of yarn and the manufacture of rayon cloth, which was then subject to control. A private company, a subsidiary of the appellants, was formed for the purpose. The issued share capital of this company was 7,900 £1 shares, of which 4,000 were held by the appellants and 3,900 by the respondents; the company had five directors of whom the respondents were two and three were nominees, and directors, of the appellants. The respondents obtained supplies of yarn, for which the appellants paid, and the cloth was woven and processed at the appellants' mill, and was then sold to and re-sold by the company. The company was successful. The appellants desired to acquire further shares at par, the value of a £1 share being then £6 odd. A proposal by the respondents for the issue of shares to the appellants at valuation was not accepted and from that time hostility on the part of the appellants and their nominees on the board of the company to the respondents developed. The appellants formed a department that carried on a business of purchasing materials and dyeing, finishing and processing them for sale. After the end of cotton control in June, 1952, the appellants were free to obtain yarn without licence. They then adopted a policy of starving the company of supplies of rayon cloth from the mill, on which the company was dependent. Early in 1953 the board of the appellants refused an offer of the respondents to sell their shares at a negotiated price (about £4 16s. per share), recording in the minutes, though the respondents were not so informed, that the company had served its purpose and should be liquidated, if possible. The nominee directors of the company adopted a policy of passive support of the appellants by inactivity, allowing the company's trading activities to decline or vanish. On petition by the respondents under s. 210 of the Companies Act, 1948*, on the ground that the affairs of the company were being conducted in a manner oppressive to some part of the members, viz., the respondents, the appellants were ordered to purchase the respondents' shares at £3 15s. each. It was common ground that it was just and equitable that the company should be wound up. On appeal,

Held: the conduct of the appellants was oppressive and, in view of the facts that the company was a subsidiary of the appellants and that the appellants' nominees on the board of the company were participating in the policy of the appellants, was also oppressive conduct of the affairs of the company within s. 210 of the Companies Act, 1948, although the misconduct of the nominee directors was negative, being passive neglect of the company's interests.

Per VISCOUNT SIMONDS (adopting words of LORD COOPER, LORD PRESIDENT,

* The relevant terms of s. 210 of the Companies Act, 1948, are printed at p. 69, letters A to C, post.

A 1954 S.C. at p. 391): the truth is that, whenever a subsidiary is formed as in this case with an independent minority of shareholders, the parent company must, if it is engaged in the same class of business, accept as a result of having formed such a subsidiary an obligation so to conduct what are in a sense its own affairs as to deal fairly with the subsidiary (see p. 71, letter I, to p. 72, letter A, and cf. p. 85, letters A and B, post).

B Appeal dismissed.

[As to alternative remedy to winding-up a company in cases of oppression, see 6 HALSBURY'S LAWS (3rd Edn.) 542, para. 1044.

For the Companies Act, 1948, s. 210, see 3 HALSBURY'S STATUTES (2nd Edn.) 630.]

C Cases referred to:

- (1) *Elder v. Elder & Watson*, 1952 S.C. 49; 10 Digest (Repl.) 857, 2438.
- (2) *Lowry v. Consolidated African Selection Trust, Ltd.*, [1940] 2 All E.R. 545; [1940] A.C. 648; 109 L.J.K.B. 539; 164 L.T. 56; 23 Tax Cas. 259; 2nd Digest Supp.

D (3) *Hivac, Ltd. v. Park Royal Scientific Instruments, Ltd.*, [1946] 1 All E.R. 350; [1946] Ch. 169; 115 L.J.Ch. 241; 174 L.T. 422; 2nd Digest Supp.

(4) *Morison v. Walton*, (May 10, 1909), unreported.

(5) *Coldman v. Hill*, [1919] 1 K.B. 443; 88 L.J.K.B. 491; 120 L.T. 412; 22 Digest (Repl.) 176, 1609.

(6) *Bell v. Lever Bros., Ltd.*, [1932] A.C. 161; 101 L.J.K.B. 129; 146 L.T. 258; Digest Supp.

E (7) *Re Yenidje Tobacco Co., Ltd.*, [1916] 2 Ch. 426; 86 L.J.Ch. 1; 115 L.T. 530; 10 Digest (Repl.) 863, 5683.

(8) *Heydon's Case*, (1584), 3 Co. Rep. 7a; 76 E.R. 637; 42 Digest 614, 143.

Appeal.

F Appeal by the Scottish Co-operative Wholesale Society, Ltd., from an interlocutor of the First Division of the Court of Session (Lord President (LORD CLYDE), LORD CARMONT, LORD RUSSELL and LORD SORN), dated Mar. 20, 1957, pronounced in a petition presented by the respondents, Dr. George Meyer and Ronald Joseph Lucas, under the Companies Act, 1948, s. 210, praying for an order on the appellants society for the purchase of the respondents' shares in the Scottish Textile and Manufacturing Co., Ltd. The facts are set out in the opinion of LORD KEITH OF AVONHOLM, pp. 75, letter G, et seq., post.

G I. M. Robertson, Q.C. (of the Scottish Bar), B. L. Bathurst, Q.C., and A. M. Johnston, Q.C. (of the Scottish Bar), for the appellant society.

R. S. Johnston, Q.C., and F. W. F. O'Brien (both of the Scottish Bar) for the respondents.

H The House took time for consideration.

July 24. The following opinions were read.

I VISCOUNT SIMONDS: My Lords, in this appeal from an interlocutor of the First Division of the Court of Session I am in such full agreement with their Lordships both in their findings of fact and in their conclusions of law that I do not think it necessary to trouble the House at such length as I otherwise might. But, inasmuch as your Lordships have for the first time to consider a new and important section of the Companies Act, 1948, it is right that I should state my views on it.

On May 7, 1946, there was incorporated as a private limited company, the Scottish Textile and Manufacturing Co., Ltd., which I will call "the company". It had an authorised share capital of £25,000 divided into 25,000 shares of £1 each. Its substantial object was the manufacture and merchandising of rayon

fabrics. The respondents, formerly of German but now of British nationality, who had left Germany when the Nazis obtained power in that country, had a large experience and extensive connexions in the continent of Europe in the rayon trade and one of them, the first respondent, Dr. Meyer, had already in 1945 been appointed textile adviser to the appellant society (hereinafter called "the society"). Into this trade the society wished to enter and, though it would have preferred to carry it on as a branch of its own business, this was for more than one reason not practicable. The respondents were unwilling to act merely as employees of the society and, since at that time licences had to be obtained for the manufacture of rayon, and were granted only to persons who could satisfy the Cotton Control authorities that they commanded the necessary skill and experience, it was mutually advantageous to the society and the respondents that a subsidiary company should be formed in which they should both be interested. The company was, accordingly, formed and 7,900 shares were issued, 4,000 to the society, 3,450 to the first respondent, 450 to the second respondent. Thus the society had such control as a majority shareholding could give. Moreover, of the five directors of the company, three were at all material times nominees of the society, the other two being the respondents, who were the managing directors. Nor was there lacking control by the society of a practical sort. For from the outset it was contemplated that, at any rate until a factory could be built or acquired for it, the company should be substantially dependent for its supplies on the society's mill at Falkland which, in 1946, was partially idle. Accordingly, under arrangements with Cotton Control, the production of a number of looms at Falkland was allocated to the company and the looms were licensed for rayon production. The first respondent made arrangements for the supply of rayon yarn to be used in the manufacture of the finished cloth, the yarn being purchased by the society and invoiced to it at Falkland Mill. There it was woven, and the woven cloth sold to the company ready for dyeing and finishing. This was the plan, and from the beginning it flourished greatly. But, my Lords, it was a plan which demanded the utmost good faith on both sides and, as your Lordships will see, it was the lack of it on the part of the society which led to this discreditable tale.

I must hark back for a moment to the year 1947. It seems that in March of that year an agreement between the parties was made for what was curiously called a realignment of their shareholding, so that, instead of approximately equal holdings, the society should hold seventy per cent. and the respondents thirty per cent. of the issued capital. That was in March, 1947, but nothing was done to carry the agreement into effect until the year 1951. In November of that year, the company being then apparently very prosperous, the nominee directors, as I will call them, under the instructions of the board of the society raised the question; numerous proposals were put forward some of which involved the purchase by the society of some of the respondents' shares. It is unnecessary to go into the details of this episode, for in the end nothing was done. The significance of it lay in the fact that the society's representatives adopted the view that they were entitled to acquire at par any shares they might get under the so-called realignment and, on a refusal of this unjust demand, threatened that the society would liquidate the company if it was not met. This and other threats led to legal advice being sought. The solicitor to the society and the company advised that the shares should be valued and bought at a valuation; they were valued by the company's auditors at no less than £6 0s. 11d. a share, and thereafter the society proceeded no further in the matter. It is impossible after reading the voluminous evidence in this case not to see that the society, thus foiled in its attempt to obtain a grossly unfair advantage of the respondents, determined to seize any opportunity of procuring for itself the benefit of the trade which had been largely built up by their efforts.

It is at this stage convenient to refer to the section of the Act under which

A the respondents petitioned the court for relief and obtained the order, against which this appeal is brought, that the society should buy their shares in the company at £3 15s. per share. It is, so far as relevant, as follows:

B “ 210 (1). Any member of a company who complains that the affairs of the company are being conducted in a manner oppressive to some part of the members (including himself) . . . may make an application to the court by petition for an order under this section.

C “ (2) If on any such petition the court is of opinion—(a) that the company’s affairs are being conducted as aforesaid; and (b) that to wind-up the company would unfairly prejudice that part of the members, but otherwise the facts would justify the making of a winding-up order on the ground that it was just and equitable that the company should be wound-up; the court may, with a view to bringing to an end the matters complained of, make such order as it thinks fit, whether for regulating the conduct of the company’s affairs in future, or for the purchase of the shares of any members of the company by other members of the company or by the company . . . or otherwise.”

D It is common ground that, at the date of presentation of the petition on July 14, 1953, it was just and equitable that the company should be wound-up. It could hardly be denied that to wind-up the company would unfairly prejudice the respondents. The only question is whether its affairs were being conducted in a manner oppressive to the respondents and, if so, whether the court ordained the appropriate remedy.

E My Lords, as I have already said, I do not propose to rehearse the facts at length. The four learned judges of the First Division, including LORD CARMONT who was deputed to take the proof, were unanimously of opinion that the society had conducted the affairs of the company in a manner oppressive to the respondents. Each of them gave a judgment which, I may perhaps be permitted to say, was a careful and exhaustive appraisal of the evidence, and, even if I did not myself come, as I do come, on an independent reading of it to the same conclusion, I should be reluctant to disturb their findings, particularly as LORD CARMONT had the peculiar advantage of seeing the witnesses. It cannot be ignored that, wherever there was any dispute of fact, the testimony of the respondents was preferred to that of the witnesses of the society. Having myself only read the written word, I must say that I was by no means favourably impressed by the evidence of more than one of the latter witnesses.

G It is, however, necessary, if s. 210 is to be successfully invoked, to show not only that there has been oppression of the minority shareholders of a company but also that it has been the affairs of the company which have been conducted in an oppressive manner, and it was to this point that a large part of the society’s argument was directed. I must, therefore, state in broad outline the course of events which led to the presentation of the petition.

H The last event that I mentioned was the failure of the society to acquire at par shares that were worth a far greater sum. This was at a time of the company’s great prosperity which, subject to the ups and downs of the textile trade, might be expected to continue. It was, however, followed by a recession in the rayon trade, of which the dates of beginning and ending were a matter of dispute. I Such dates cannot be precisely determined and are of no consequence. It is, however, to be noted that it was in the course of it that rayon control came to an end, so that neither the society nor the company any longer depended on the personality of the respondents to get supplies of yarn. It was also in the course of it that the first respondent was anxious to visit Germany with a view to increasing the company’s trade in that country but was prevented by his co-directors from doing so. This was undoubtedly the cause of much ill feeling,

and was itself a matter of complaint in the original petition, but, as the averment in regard to it was struck out, I say no more about it. During the same period, other incidents occurred which aggravated the hostile relations between the first respondent and Mr. Schofield the manager of the society's Falkland Mill.

An important consequence of the removal of cotton control was this. In or about June, 1951, a new department of the society had been formed called the merchant converting department. It was under the control of a Mr. Wands, the manager of the drapery department, and its function was to convert loom state cloth by dyeing, printing and finishing into material for manufacture into garments. It therefore became possible, on the removal of cotton control and on a revival of the rayon trade, for the society to divert to its own converting department the product of its Falkland Mill. It was the fact, as it was well aware, that the company which had throughout been practically tied to it for the greater part of its supplies, would have great difficulty on a revival of trade in getting them elsewhere. Deliberately it supplied the necessary material to the converting department but, in spite of the first respondent's protests, declined to supply the company except at higher and non-competitive prices. An attempt to justify this discrimination was rightly regarded by their Lordships of the First Division as unsatisfactory. I have no doubt that, at any rate by the end of 1952, it was the policy of the society by one means or another to destroy the company it had created, knowing that the minority shareholders alone would suffer in that process. But it is in truth unnecessary to seek to draw inferences from ambiguous facts. For in January, 1953, a Mr. Robert Taylor, a director of the society and then chairman of the company, had an interview with the respondents. He cannot be absolved from a share in the lethal policy of the society, but is entitled to what credit may be due for the attempt to make the death as merciful as possible. He told them frankly that the society was out to destroy the company, that they had no chance against such a powerful organisation, and that they should make their peace with the society by offering to sell their shares, and he offered to draft, and two days later drafted, a letter for them to send to the society. It is not surprising that the first respondent wrote, though not in the terms suggested by Mr. Taylor, offering on behalf of the second respondent and himself to sell their shares at a negotiated price. This letter having been referred to a joint meeting of the society's finance sub-committee and the furnishing sub-committee, those sub-committees met and agreed that the company had served its purpose and should be liquidated if possible. At about the same time, the finance sub-committee interviewed the respondents, who intimated that, in their opinion, a fair price for the shares was 96s. per share, and also that they were prepared, after selling their shares, to stay on in the service of the company. The same sub-committee recommended that the first respondent should be informed that the society did not wish to accept the offer to sell "at the present time". These recommendations were approved by the board of the society on Feb. 9, 1953, and a letter was duly sent to the first respondent informing him of the decision not to accept the offer to sell "at the present time". He was not told, and did not learn until in these proceedings the minute was produced, that the society had decided that "the company had served its purpose" and should be liquidated if possible.

At this time the three nominee directors of the company were aware (Mr. Taylor by his own confession) of the policy of the society. It is undeniable that persons so placed may find themselves in a difficulty. But, in all the evidence, I have not been able to find the least trace that they regarded themselves as owing any duty to the company of which they were directors. They were the nominees of the society and, if the society doomed the company to destruction, it was not for them to put out a saving hand. Rather, they were

A to join in that work, and, when a frank and prompt statement to their co-directors might have enabled them to retrieve its fortunes, they played their part by maintaining silence. That is how they conducted the affairs of the company, and it is impossible to suppose that that was not part of the deliberate policy of the society. As I have said, nominees of a parent company on the board of a subsidiary company may be placed in a difficult and delicate position.

B It is then the more incumbent on the parent company to behave with scrupulous fairness to the minority shareholders and to avoid imposing on their nominees the alternative of disregarding their instructions or betraying the interests of the minority. In the present case, the society pursued a different course. It was ruthless and unscrupulous in design, and it was effective in operation, and, as I have said, it was promoted by the action or inaction of the nominee directors.

C The company, which might have recovered its former prosperity, had "served its purpose". It could conveniently be liquidated. I have omitted much which reflects no credit on the society and its officers, for I do not want to repeat what has already been said or to anticipate what will fall from some of your Lordships. I will only mention the final fact that, on Aug. 24, 1953 (that is

D after the presentation of the petition under s. 210) the respondents were given three months' notice of termination of their appointments as managing directors, and Mr. Wands, the manager of the society's drapery department, was appointed manager of the company.

My Lords, on the facts as I have outlined them and as they appear in greater detail in the judgments of their Lordships of the First Division, it appears to

E me incontrovertible that the society has behaved to the minority shareholders of the company in a manner which can justly be described as oppressive. It had the majority power and it exercised its authority in a manner "burden-
some, harsh and wrongful"—I take the dictionary meaning of the word. But, it is said, let it be assumed that the society acted in an oppressive manner;

F yet it did not conduct the affairs of the company in an oppressive manner. My Lords, it may be that the acts of the society of which complaint is made could not be regarded as conduct of the affairs of the company if the society and the company were bodies wholly independent of each other, competitors in the rayon market, and using against each other such methods of trade warfare as custom permitted. But this is to pursue a false analogy. It is not possible to

G separate the transactions of the society from those of the company. Every step taken by the latter was determined by the policy of the former. I will give an example of this. I observed that, in the course of the argument before the House, it was suggested that the company had only itself to blame if, through its neglect to get a contract with the society, it failed in a crisis to obtain from the Falkland Mill the supply of cloth that it needed. The short answer is that

H it was the policy of the society that the affairs of the company should be so conducted, and the minority shareholders were content that it should be so. They relied—how unwisely the event proved—on the good faith of the society, and in any case they were impotent to impose their own views. It is just because the society could not only use the ordinary and legitimate weapons of commercial warfare but could also control from within the operations of the

I company that it is illegitimate to regard the conduct of the company's affairs as a matter for which it had no responsibility. After much consideration of this question, I do not think that my own views could be stated better than in the late Lord President, LORD COOPER's words on the first hearing of this case. He said (1954 S.C. at p. 391):

"In my view, the section warrants the court in looking at the business realities of a situation and does not confine them to a narrow legalistic view.

The truth is that, whenever a subsidiary is formed as in this case with an independent minority of shareholders, the parent company must, if it is engaged in the same class of business, accept as a result of having formed such a subsidiary an obligation so to conduct what are in a sense its own affairs as to deal fairly with its subsidiary."

At the opposite pole to this standard may be put the conduct of a parent company which says "our subsidiary company has served its purpose, which is our purpose. Therefore let it die" and, having thus pronounced sentence, is able to enforce it and does enforce it not only by attack from without but also by support from within. If this section is inept to cover such a case, it will be a dead letter indeed. I have expressed myself strongly in this case because it appears to me to be a glaring example of precisely the evil which Parliament intended to remedy.

Some criticism was made of the relief given by the order of the court. It was said that only that relief could be given which had as its object and presumably its effect the "bringing to an end of the matters complained of" and that an order on the society to purchase the respondents' shares in the company did not satisfy that condition. This argument is without substance. The matter complained of was the oppression of the minority shareholders by the society. They will no longer be oppressed and will cease to complain if the society purchase their shares.

Finally, it was said that the court had not properly exercised its discretion in fixing a price of £3 15s. per share. I see no ground for interfering with this decision. Necessarily a price cannot be scientifically assessed, but I heard no argument nor had any evidence called to my attention which suggested that their Lordships had acted on any wrong principle or adopted a measure too generous to the respondents.

The appeal should accordingly, in my opinion, be dismissed with costs.

LORD MORTON OF HENRYTON: My Lords, I shall refer to the appellant society as "the society" and to the Scottish Textile and Manufacturing Co., Ltd., as "the company".

I would accept the finding of fact by the First Division of the Court of Session which the Lord President (LORD CLYDE) expressed as follows (1957 S.C. at p. 121):

"Foiled in their attempt to secure the realignment of the shareholdings by the purchase of shares from the [respondents] at or about par, the society as a matter of policy thereafter proceeded, as the subsequent events demonstrated only too clearly, to endeavour to force down the value of the company's shares, and in the process, in effect, to transfer the goodwill of the company's business to the society itself."

The conduct thus described was, no doubt, oppressive to the company and to the respondents' minority shareholdings in the company. It is necessary, however, to consider what was the nature of the steps taken by the society in furtherance of the policy thus described, in order to see whether they bring the case within s. 210 of the Companies Act, 1948. The respondents, as members of the company, can only succeed if they prove that "the affairs of the company"—and I emphasise the words "of the company"—were "being conducted in a manner oppressive to some part of the members", i.e., to themselves.

I cannot improve on the learned Lord President's summary of the steps taken by the society, and I gratefully adopt it. After referring to the fact that

A cotton control, and its attendant licensing system, came to an end in June, 1952, the learned Lord President continued (*ibid.*, at p. 122):

B “The door was then open for the department [that is, the society’s own merchant converting department] to utilise Falkland Mill [which belonged to the society] for the manufacture of rayon and to merchant it themselves —thereby by-passing the company altogether. The trade and the connexions built up by the company could then be transferred to the society itself, and the goodwill of the company emptied of almost any content. No contractual arrangement had been made between the company and Falkland Mill whereby the latter undertook to do the weaving for the former. All the members of the company’s board knew that the facilities at Falkland Mill were essential to the company, and no breach of any formal contract (as distinct from any question of fair dealing) was therefore involved in Falkland Mill abandoning the customer who had employed it for so many years and substituting the merchant converting department of the society as its customer. But this is what was in fact done.

D “By the autumn of 1952 a temporary trade recession in rayon had passed; manufacturers were getting busy, and the market was short of goods. It would not have been easy for the company in these conditions to secure its manufacturing requirements in some other quarters. Now that the barrier created by the existence of cotton control was removed, this was the moment selected for the gradual transfer of the society’s interest in the merchandising of rayon from the company to the merchant converting department.”

F The Lord President then went on to state that the prices which Falkland Mill quoted for deliveries to the company, and refused to lower, were quite uneconomic for the company, and were throughout consistently above market prices. He referred to efforts made by the first respondent to induce Falkland Mill to do business with the company, and continued (*ibid.*, at p. 123):

G “Nothing came of these approaches, as the mill’s prices remained far too high. [The first respondent] reported the difficulties to the board of the company, all the members of which must have realised how serious an effect these high quotations were having on the operations of the company. But none of the members of the board appear to have given him any assistance or explanation, nor taken any steps to try to remedy the situation by raising his difficulties at any committee or board meeting of the society.

H “The reason is not far to seek. At the very time when [the first respondent] was finding the mill consistently quoting these high prices to him, the society decided that the merchant converting department should obtain deliveries of rayon goods from the Falkland Mill. This was not a mere departmental matter arranged between managers, but was raised to a policy level by a direct approach to the merchant converting department by the manager of Falkland Mill. This is clear on the evidence both of Mr. Schofield and of Mr. Wands. The board of the society and the society’s nominee directors on the board of the company were therefore fully advised of the decision.

I “Moreover, the arrangement made was that the mill would supply woven rayon cloth to the merchant converting department and that the mill would ‘accept the prices which the department was prepared to pay, and see the manager of the department about it later if the prices were not economical ones’. To start with, experimental orders only were given and

accepted. But the manager of the department said in evidence that he gave Falkland Mill in 1952 enough orders to keep the looms going for six months. In 1953 and 1954 all the rayon looms at Falkland were operating for the merchant converting department. This department was buying from the mill at prices throughout substantially lower than those quoted by the mill to the company. Moreover, on the costing figures produced by the [society], the prices at which the merchant converting department was buying were completely uneconomic.

"It was contended that there was nothing wrong in the mill changing over from one customer to another, particularly if the mill could not arrange a mutually satisfactory price with the company. This would no doubt be so if both customers were treated alike, or if it could be maintained that the company was holding out for an unduly low price. But this was not the situation. The policy adopted involved starving the company of deliveries and diverting the production to the merchant converting department at substantially lower prices with the understanding that the department would see about it later if the prices turned out too small. It involved a clear violation of the elementary principles of fair dealing which normal commercial standards require."

My Lords, it is, I think, manifest that the oppressive operations so clearly described were all operations in the conduct of the society's affairs, not in the conduct of the company's affairs. The society so conducted its affairs as to oppress the company by shutting it off from its previous source of supply. By so doing, the society did, I think, oppress the minority shareholders in the company; but, as I have already pointed out, the respondents can only bring themselves within s. 210 of the Act of 1948 if they prove that the affairs of *the company whereof they are members* are being conducted in a manner oppressive to themselves as minority shareholders. They cannot succeed, in my opinion, merely by proving that the affairs of another company are being so conducted, even if that other company holds the majority of the shares in the company whereof the respondents are members and nominates the majority of its directors. It may be unfortunate that this form of oppression is not covered by the section; but this is, to my mind, the inevitable result of the words "the affairs of the company are being conducted". For this reason, my Lords, I should have held the society entitled to succeed if the only evidence of oppression has been evidence that the society deliberately so conducted its own affairs as to cause hardship to the company and to force down the value of its shares, however regrettable such conduct may be, and whether or not it may be actionable.

I turn now to consider whether there is any other ground on which the present case comes within s. 210. Counsel for the respondents contend that certain directors of the company, nominated by the society and constituting a majority of the company's directors, or the society acting by these directors, "conducted" the affairs of the company "in a manner oppressive" to the respondents. As these directors of the company were also directors of the society, they must, no doubt, be treated as parties to the oppression by the society in the conduct of its own affairs; but I have had great difficulty in arriving at a conclusion on the question just posed, which is directed only to the affairs of the company. The inaction of these directors at a critical time was pointed out by the Lord President in a passage which I have already quoted from his judgment, and their conduct throughout the relevant period is open to severe criticism. My difficulty is that the conduct of which complaint is made consists rather of sins of omission than of sins of commission, and the day-to-day affairs of the company appear to have been "conducted" by the respondents without any active interference

A by the other directors, except, possibly, on two occasions, which the First Division excluded from proof on the ground of irrelevancy, and except that notice of dismissal, on the ground of saving expense, was given to the respondents after they had presented the present petition. I shall not detain your Lordships by referring in detail to the evidence. Suffice it to say that, in the end, I have reached the conclusion that there is evidence to justify the view that the affairs
B of the company were "conducted in a manner oppressive" to the respondents. I am not disposed to give a narrow meaning to these words, having regard to the manifest object of s. 210. I am naturally assisted to my conclusion by the fact that the decision of the four learned judges of that Division (including LORD CARMONT, who had the advantage of seeing and hearing the witnesses)
C was unanimous, and by the fact that your Lordships are all of the same opinion. I agree that this appeal must be dismissed.

LORD KEITH OF AVONHOLM: My Lords, this appeal arises out of a petition presented by the respondents against, inter alios, the appellants (whom I will call "the society") under s. 210 of the Companies Act, 1948. Under
D the procedure of the Court of Session such a petition must be presented to the Inner House and, unless it is remitted to the Outer House, is dealt with and disposed of by the Inner House. Where, in the Inner House, inquiry into the facts through the mouths of witnesses is thought necessary, evidence is taken in the presence of one of the judges of the Division of the Inner House before whom the petition comes, and the hearing on the evidence thereafter takes place
E before the full Division, including the judge who saw and heard the witnesses. This judge gives no opinion until, after the hearing, he takes part in the judgment of the court. This was the procedure followed in the present case.

This petition was presented as far back as July 14, 1953, and, after a hearing on relevancy, the court, on June 1, 1954, gave a judgment allowing parties a
F proof before answer of their respective averments, excluding certain averments of the respondents from probation, and appointed the proof to proceed before LORD CARMONT, one of their number. The proof, which commenced on Mar. 25, 1955, was lengthy and voluminous, and extended, with many interruptions, for a period of over a year, though the actual number of days occupied was only twelve. After a hearing lasting thirteen days, the First Division gave judgment
G on Mar. 20, 1957, ordaining the society to purchase the shares of the respondents in the Scottish Textile and Manufacturing Co., Ltd. (hereinafter called "the company") at a price of £3 15s. per share.

It is difficult to compress the salient features of the case even in broad outline. The respondents, who were originally of German nationality and are now naturalised British subjects, came to this country in 1939. Through an advertisement,
H the first respondent got in touch with the society in 1945 and got employment from it as textile adviser. He had considerable knowledge of rayon trade and production, and conceived the idea that one of the society's weaving mills at Falkland could be profitably employed in the weaving of rayon goods, which would be for it a new line of manufacture. He had great experience of the processes involved and had formulae of his own. He also had trade
I connexions abroad, and he succeeded in establishing relations with the Cotton Control Board who controlled the supply of yarn and manufacture of the cloth. Ultimately it was agreed between the society, the first respondent and the second respondent, who had been associated with the first respondent in the textile business in Germany before the war, that a company should be formed on certain terms for the purpose of manufacturing and dealing in textile fabrics of all descriptions. The company, called the Scottish Textile and Manufacturing Co., Ltd., was incorporated on May 7, 1946, with an authorised capital of £25,000

in one pound shares. Thereafter in March, 1947, a second agreement was entered into between the parties which gave effect largely to what had been agreed before the incorporation of the company. The terms of this agreement are important in the light of what follows. I recite the greater part of this agreement:

“ FIRST

“ The share capital of said company is twenty-five thousand pounds divided into twenty-five thousand shares of one pound each and subject to the provisions of Clause Tenth hereof the [society] shall subscribe and hold in their own right up to seventeen thousand five hundred of said shares, [the first respondent] shall subscribe and hold in his own right up to five thousand two hundred and fifty of said shares and [the second respondent] shall subscribe and hold in his own right up to two thousand two hundred and fifty of said shares the said shares to be allotted and issued from time to time as the directors of the [company] may decide.

“ SECOND

“ The [society] shall purchase as they do hereby purchase from [the first respondent] all his formulae for the manufacture of textile fabrics for the price of three thousand pounds which formulae [the first respondent] has now delivered to the [society] and as to payment of the said price [the first respondent] hereby requests and authorises the [society] to pay the same to the said [company] to be held for his account and applied towards settlement of the amount due by [the first respondent] to said company for shares allotted to him.

“ THIRD

“ The [society] in addition to being otherwise entitled to use said formulae shall place the same at the disposal of the said [company] which shall have full liberty and licence to use the same without restriction.

“ FOURTH

“ The [society] are entitled and shall continue to be entitled to nominate three persons to act as directors of the said [company] along with [the first respondent] and the [second respondent] who already have been elected directors of the company and appointed managing directors thereof.

“ SEVENTH

“ [The respondents'] appointments as joint managing directors shall subsist for a period of three years as from May 7, 1946, notwithstanding the date hereof, and on the expiry of said period unless terminated as hereinafter provided, or unless renewed for a further period, shall thereafter continue from year to year. [The respondents'] appointments as managing directors or one or other of them may be terminated by the company on three months' previous notice in writing being given to that effect, but said notice shall not prejudice their status to act as ordinary directors of the company if so elected.

“ EIGHTH

“ [The respondents] in the performance of their duties as joint managing directors shall promote and safeguard the company's interests faithfully and with due diligence and they shall devote their whole time to the management and supervision of the company and in particular they shall apply, without reservation in any respect their specialised knowledge and experience

A in the textile trade to the advantage and benefit of the company. [The respondents] shall also use every endeavour to renew or to re-establish all former trade connexions held by them with customers and agents both in Great Britain and abroad with the purpose of enhancing and developing the company's interests to the best extent.

B "NINTH

C "[The respondents] shall make full disclosure for the use benefit and advantage of the company of all formulae, processes and inventions which they may discover during the tenure of their appointments. They shall also place at the disposal and use of the company all patent rights (but excluding trade names previously held by them) of which they are the present owners or of which they may come to be possessed during the period of their respective appointments and that all free of charge. Further [the respondents] or either of them bind and oblige themselves not to transfer or make known to any other person or company any formulae (including the formulae sold to the [society] by [the first respondent]) processes, patent rights or inventions held or to be held by them or to become known to them respectively without the written consent of the company. Neither shall they grant licences to any other person or company to use such formulae, processes, patent rights or inventions without the written consent of the [society]."

E "TENTH

F "In the event of this agreement coming to an end or in the event of [the respondents'] appointments with said company being terminated from any cause whatever the [respondents] shall have the option to sell their shares in said company to the [society] who shall be bound to purchase said shares and that at a price to be fixed by the auditors of the company, said auditors' decision as to price being final and binding; . . ."

G Of the authorised share capital of the company, only 7,900 shares were actually issued, of which 4,000 were held by the society, 3,450 by the first respondent and 450 by the second respondent, all fully paid. This was not according to the proportions contemplated by the agreement, which were in the ratio of seventy to twenty-one to nine, and, although this disproportion was accepted and apparently desired by the society at the beginning, it carried with it later, as will be seen, the seeds of dissension between the society and the respondents.

H To commence operations, it was necessary for the company to secure three things—sources of supply of rayon yarn, a licence from Cotton Control to obtain and weave the yarn, and a place at which to weave it. The first respondent was the chief, if not the sole instrument, in obtaining the first two of these things, and he was largely responsible for securing the third. It was contemplated, apparently, that the company might obtain a factory of its own. On Dec. 29, 1945, before the company was incorporated, the society minuted approval of a recommendation by its furnishing sub-committee

I "that steps should be taken without delay to rent a suitable factory. When we are successful in obtaining premises, sub-committee would consider transferring to them [the company] several looms (say twenty-four) from the linen works at Falkland. Until such time as a factory becomes available production would be carried on at Falkland and elsewhere."

At a meeting of the company's board on Jan. 14, 1947, the first respondent reported disappointment that the twenty-four looms promised at the outset had

not been altogether made available, and that not more than ten looms were running on the company's behalf at Falkland. He stressed the fact that

"sales total was entirely dependent on the supply of cloth received from Falkland and that the rapid progress of the company was only possible by means of increased production."

The board, which included the society's nominee directors, resolved that the report be accepted and the society be approached to ascertain a date when the company might expect the twenty-four looms to be in operation on its behalf. The first respondent had, in fact, by this time obtained a licence from Cotton Control for these looms, and, in March, 1948, he received a revised licence to operate forty looms at Falkland Mill with effect from Mar. 1, 1948. It is only necessary to add that rayon production at the mill increased from some 23,000 yards in 1946-47 to over 475,000 yards in 1949-50, showing to the mill, in money, an increase from £3,087 to £39,532. The relationship observed between the company and the mill was that the first respondent procured the rayon yarn which was invoiced to the mill and paid for by the society, and the company paid the mill for the cloth produced for it. The cloth was then dyed, dressed, or otherwise treated and sold by the company to its customers. The idea of setting up an independent factory by the company faded into the background and, after a short initial period when the mill was being equipped and its workers trained for rayon production, the mill, on the rayon side, became the company's chief supplier, and the mill wove rayon exclusively for the company.

The rest of the story is an unfortunate one. The company prospered for some five years and more, made considerable profits, paid large dividends and accumulated substantial reserves. The rayon looms at Falkland Mill were, during the same period, fully employed. About September, 1951, however, trade began to slacken. To the first respondent it appeared that a recession was approaching, not unconnected with rumours about changes in purchase tax. He wished to hold back supplies ordered from Falkland Mill until he saw how things were going to develop and what customers wanted. This did not please Mr. Schofield, the manager of the mill, who wished to keep his workers engaged on the looms. He had large quantities of yarn in stock obtained through the efforts of the first respondent. I have little doubt that the first respondent's policy was sound, looking at the close relations between the mill and the company. If there was no market for cloth, there was no point in the mill making cloth to be accumulated by the company with no orders in sight and with no money coming in to pay for it. The last bulk order for cloth given by the company to the mill in 1951 was on Aug. 22, 1951, and a dispute arose about the mill continuing to weave to this order, which was not settled till April, 1952. There are indications in the evidence that, even before this, Mr. Schofield was not particularly well disposed to the first respondent, and I think that from this time onwards his attitude unjustifiably hardened against him.

Another event took place about this time which is crucial in this case. The society, stimulated presumably by the prosperity of the company and desiring to have a share interest in the company corresponding to what it was entitled to under the original agreement, decided to seek what was described as a proper alignment of the shareholding. The matter came before the society first on Aug. 20, 1951, and its representatives on the company's board were thereafter asked to raise the matter with the company. At a board meeting of the company on Nov. 5, 1951, proposals were continued for further consideration at a meeting to be held on Nov. 20. In the meantime, on Nov. 15, an informal meeting took place between Messrs. Nicholson, Patterson and Dow, the society's nominees on the company's board, and the respondents, at which Mr. Douglas, the company's

A secretary, was also present. No minute was taken of this meeting and what transpired can be got only from the evidence given in this case. The judges of the First Division, including LORD CARMONT, who saw and heard the witnesses, have accepted the account given by the respondents, and I find it impossible to take a different view. At the meeting discussion took place on certain proposals for rearrangement of the share capital. The society's representatives insisted that they should acquire the shares at par. The respondents objected. Discussion got heated, and the respondents say threats were made that, if they did not agree, the society would liquidate the company. When the first respondent pointed out that this was impossible as the society did not have a three-quarter majority of shareholding, another threat was made that "we will increase the capital to £25,000 and that will put you in a pickle." The shares of the company were at this date of considerable value. But Mr. Nicholson, one of the society's representatives, who was present at the meeting, agrees that the society was determined to realign the shares at par value.

Following this meeting, the first respondent put forward certain proposals in writing to the society, one of which was that 5,100 new shares should be allotted to the society at a value to be ascertained by the auditors of the company. The society resolved to ascertain the decision of the auditors before coming to a decision. The auditors fixed a value of £6 0s. 11d., and, on Feb. 18, 1952, the society's board resolved that this be noted and communicated this decision to the company. No further action was ever taken in the matter of realignment of shares by the society. From this date till the end of the tale it is, I think, clear that there existed in the company an atmosphere of hostility on the part of the society's nominees on the board to the respondents, except in the case of Mr. Taylor, who was not at all times on the board. Even Mr. Schofield seems to have been aware of the fact, and Mr. Taylor recognised it, as will be seen in the events of a year later. It is to be remembered that the directors of the company were personally, or as representatives of the society, the only shareholders, and that the company was a private company. No appeal to a shareholders' meeting would alter the situation because the composition of the board and the shareholders' meeting would be the same.

The recession deepened through the major part of 1952, and manufacture by the mill for the company was non-existent. It would seem likely that the recession was felt by other mills of the society than Falkland Mill, but a veil is drawn over much of the society's and the respondents' activities in 1952 by the exclusion from probation by the Court of Session of inquiry into certain happenings of which complaint was made by the respondents in their pleadings.

In June, 1952, cotton control was abolished. This has a material effect on what followed, for it left the society free to procure rayon yarn and weave rayon cloth without any licences. No orders had passed from the company to Falkland Mill since 1951. But trade began to pick up in the autumn of 1952, and it is clear that the first respondent was anxious for the mill to resume weaving for the company. The mill itself was at a low ebb. There were no looms working on rayon cloth. It was impossible, however, for Mr. Schofield and the first respondent to come to terms on prices. On Nov. 15, 1952, the first respondent writes to the mill:

"We feel most unhappy to place our order somewhere else while not all of your looms are working. Please do recalculate your prices again."

On Nov. 20, he writes: "We are very reluctant to place an order with some other firms while your looms are standing idle," and suggests a small order of some 16,000-17,000 yards

“so that we can start business again and then we can review the position from time to time and see if we can carry on or not. This would at least, even if we both worked without any profit at all, mark the beginning.”

Mr. Schofield quoted prices of 1s. 7d. a yard and 1s. 9½d. a yard for two qualities of cloth, which the first respondent was unable to accept, and, on Dec. 4, the first respondent is writing again: “I feel very sorry indeed that you are unable to accept an order from us after so many years of co-operation.” On the same date Mr. Schofield was writing to the convener of the drapery and furnishing committee of the society, following on an interview with them two days earlier, in which he presents the mill’s point of view and concludes:

“We are in desperate need of work for these rayon looms at the present time, and in view of the foregoing circumstances, we consider that we are receiving unfair treatment from the [company].”

This letter was never disclosed to the respondents, though it may well have been known to the company’s society nominees and it is, I think, significant that it should have been written at a time when other plans were maturing. Shortly before this date, the drapery department of the society had put Mr. Schofield in touch with a department of the society, formed about a year before, known as the merchant converting department. This was a department which carried on a business similar to that of the company. In other words, it included the business of buying materials and dyeing, finishing or otherwise processing them for sale to customers. The proposal was that the mill should supply the merchant converting department with a variety of woven goods for converting, including rayon cloth. This idea came to fruition, and the first experimental order for rayon cloth was placed on Dec. 11, 1952, and the first bulk order in April, 1953. For the year 1953, £2,167 worth of rayon cloth was supplied by the mill and for the year 1954, £11,776 worth. From transfer invoices produced for these years it is shown that a line of rayon cloth, known as 1009, was throughout debited by the mill to the merchant converting department at 1s. 6½d. a yard. The lowest price quoted by Mr. Schofield to the company for this quality on Nov. 24, 1952, was 1s. 7d. a yard, and the first respondent was never able to secure a better quotation. Indeed, much later, in July, 1953, when the society was not prepared to provide cloth for the company except on a weaving commission basis, Mr. Schofield was quoting prices which, on a manufacturing basis, worked out as high as 1s. 9½d. a yard. In December, 1952, when the first respondent was endeavouring to resume business with the mill, he was able to buy this quality cloth from other sources at about 1s. 5s⁶d., and from a merchant converter at 1s. 6½d. In these circumstances the judges of the First Division all took the view that there was a policy on the part of the society to starve the company of cloth, and I do not find it possible in the circumstances proved to differ from this view. It is said that, during 1953 and 1954, the society made a contribution to the mill to make up for the alleged uneconomic price charged by the mill against the merchant converting department. But, like LORD SORN, I find the evidence on this very unsatisfactory and unconvincing. The allowance, for which no specific figures can be shown in the books of the society, would seem to have been given, if at all, in respect of the conversion at the mill of looms that had nothing at all to do with the weaving of rayon. Likewise, I discard the costing evidence given to support the prices quoted by Mr. Schofield to the company. It falls with the other evidence, and it seems that, in any case, it is based on reduced production at the mill, whereas the first respondent was anxious to get the mill back to a state of full production. I find it difficult to appreciate how, if the first respondent was unable to compete on the mill’s quotations in a

A competitive market, the society would be able to compete, unless it be that the society enjoyed a quasi-monopoly in the retail co-operative world.

The next chapter in this unfortunate history opens with the month of January, 1953. In that month the respondents had a meeting with Mr. Taylor, one of the society's representatives and fellow director, with whom the first respondent was on friendly personal and social relations. The first respondent says Mr. Taylor told him: "They want to get you out and to destroy the company, and you have no chance at all," and the second respondent gave evidence to the same effect. Though Mr. Taylor denies using this language, LORD CARMONT accepts it as true, and it certainly fits in with the surrounding facts and circumstances at the time. About the same time, Mr. Taylor drafted a letter which he suggested the respondents should send to the society. It was not sent, as will be seen, but it shows Mr. Taylor's recognition of the existing situation. It opens:

"I explained to you [the society's secretary] on Friday afternoon how unhappy [the second respondent] and I have been recently because of the strained relations in our board."

D After a reference to the impossibility of re-establishing harmony and offering their shares to the society, it proceeds:

"You will understand how reluctant we are to take this step as we have been together associated with [the company] since it was formed and we feel we were making it a success as the records will show. However, it is quite impossible to carry on in the present atmosphere and this decision is forced upon us."

The letter, dated Jan. 27, 1953, that was sent by the first respondent was couched in somewhat different language and, in particular, refers to a price to be negotiated for the respondents' shares. It runs:

F "Dear Mr. Stirling,

"In our conversation last Friday, we covered all events from the negotiations regarding the ratio of shareholding up to today. I explained to you how the very harmonious and friendly relations which were the guiding principle in all our dealings started to deteriorate rapidly, and certain actions taken during the last fifteen months did serious harm to our prosperity and goodwill.

G "[The second respondent] and myself regret this turn of events most deeply as it affects not only our livelihood which we built up with so much pain and labour, but also our sentiment and affection which we gave wholeheartedly to the co-operative idea in spirit and actions.

H "In spite of all these happenings we still feel that a friendly settlement is very much desired at least from our side and we have therefore decided to offer to you our shareholding of 3,900 shares at a price to be negotiated between us.

I "As we have to take certain important decisions very soon we would be grateful if you could let us have your views as soon as possible.

"Yours truly,

"(Sgd.) GEORGE MEYER."

Following on this letter, the respondents had a meeting with the society's finance sub-committee, when it was indicated to them that, as they wished to give up their interest in the company, it might be voluntarily liquidated. The

first respondent stated that in that case the goodwill would be lost, that they had had no desire to bring about the present position and they were not going to give up their shares at a liquidation value, and in their opinion, they should be paid 96s. a share. They were prepared to stay on after selling their shares to the society. At a meeting of the society's board on Feb. 9, 1953, it was minuted that the finance sub-committee and the furnishing sub-committee had met and agreed that the company "had served its purpose" and should, if possible, be put into voluntary liquidation. The interview with the respondents was then referred to, and a recommendation of the finance sub-committee approved that a reply be sent to the first respondent indicating that the society did not wish to accept his offer to sell the shareholding of the second respondent and himself "at the present time." The purpose which the company had served was plain. It was introducing rayon production to the society, as Mr. Nicholson, one of the society's directors, himself said in evidence. A B C

The respondents knew nothing of the terms of this minute or of the decision by the two sub-committees that the company had served its purpose. But they did receive a letter dated Feb. 9, 1953, stating that the society did not wish "at the present time" to accept the offer to sell to it the respondents' shares. After that, according to the first respondent, the respondents were refused access to the company's books. There followed a letter from the respondents' solicitors to the society, dated Feb. 19, threatening proceedings under s. 210 if the respondents' shares were not taken over at £6 0s. 11d. a share. The respondents continued to carry on in the company while attempts were made to resolve the differences between the parties. These, however, came to nothing, and the present proceedings were commenced on July 14, 1953. The respondents still remained with the company. Business, however, was at a low ebb, and, on Aug. 24, 1953, the board passed a resolution that their employment as managing directors should terminate on Nov. 30, 1953. They were, I think, still anxious to do what they could to promote the trade of the company, and conserve its goodwill and did in fact do some business through other sources than the mill. Under their agreement they were, in any case, bound to do so, and had been told to do so at a board meeting of Aug. 24, 1953. But excessively high commission weaving rates quoted by Mr. Schofield prevented business on any scale being done with the mill, and disputes arose also with regard to a special order where the price charged was of no consequence. The evidence suggests to me the continuance of a policy of hostility to, and discouragement of, the respondents by the society. This period produces an instance of support of the respondents by their fellow directors. Following a meeting of the company's board on Aug. 18, 1953, at which the first respondent complained of the rates quoted by the mill, the company's secretary, on the board's authority, wrote to the society's secretary that D E F G H

"my board would like to inquire if there is any possibility of the quoted commission weaving charges from the linen works, Falkland, being reduced,"

an inquiry which produced a reply in the negative. But this, it seems to me, was but an idle gesture. Litigation was in progress, the company's conduct was under the scrutiny of the court, and the mill, to the knowledge of the society's representatives, was now in active production for the merchant converting department. I

My Lords, all the judges of the First Division take the view that it was the deliberate policy of the society in the later years of its history to depress the value of the company's shares by starving it of supplies, and some of them would date the genesis of this policy from the events at the end of 1951 and beginning of 1952, when the society found itself unable to obtain an adjustment

A of its holding at par. There is, I think, no positive conduct proved to support that view before June, 1952, when cotton control was abolished, but from that date there was an opportunity afforded to the society to pursue such a policy, if it had already entertained it, and I think, as events showed, it did, in fact, then adopt such a policy. The crucial evidence is that bearing on the trading relations between the mill and the merchant converting department on the one hand and the mill and the company on the other. I have already narrated the facts and, in my opinion, there was started in the autumn of 1952 a policy which took effect in 1953 of utilizing the rayon looms in the mill for the production of cloth for the merchant converting department and shutting off the company from its ordinary source of supply. This was done not by refusing orders from the company but by quoting to the company prices at which it could not hope to compete in the selling market. While the society was at pains to show that, because of the costs of production, it could not quote lower prices, the fact remains that, throughout the whole of 1952 and 1953, cloth was being passed from the mill to the merchant converting department at prices which, for at least book-keeping purposes, were being noted at a figure per yard materially lower than that quoted to the company. It is in evidence that the various trading departments of the society were regarded as separate entities expected to show results on a commercial basis. If that meant that the society was content that the mill should work at a loss in order that the merchant converting department should work at a profit, that only means that it allowed the mill to show favour to the merchant converting department which it could equally have shown to its old customer the company. But I prefer the view that the mill was giving the merchant converting department rayon cloth at prices which it was prepared to quote on an ordinary commercial and competitive basis. I have already dealt with the evidence by which the society seeks to escape this natural inference. Mr. Schofield's own evidence was that he was expected to show a profit at his mill. It is to be remembered that the company was, shortly before, giving full employment to the rayon looms and that, if it had been allowed the opportunity to place orders after the recession passed, there was every reason to think it would do so again. According to the evidence, trading prospects were good, and the results shown in the production of rayon for the merchant converting department bear out this evidence. According to a report of the manager of the drapery department dated Aug. 8, 1953, the cost prices of the mill were based on covering overheads on reduced production and it was anticipated "that if full productive capacity can be obtained mill cost prices will be lowered."

From the company's point of view the position was very serious. It had become dependent on the mill for its supplies of cloth. At the height of its prosperity, ninety-four per cent. of its cloth was obtained from the mill. When trade revived in 1953, other sources on any scale were not available to the company. Manufacturers were busy supplying their regular customers. The position was so minuted by the company as the opinion of the managing directors on Aug. 24, 1953. Mr. Schofield agrees that it was difficult for the company to obtain woven cloth in any quantities outside Falkland and that the company had been tied to Falkland for its rayon cloth. On the other hand, the society had the formulae, connexions and technical knowledge introduced to the mill by the company through the first respondent and the equipment and workers to manufacture the cloth free from any controls. For practical purposes the mill had started as being, on the rayon weaving side, the company's mill, a substitute for a mill owned by, or leased to, the company. The rayon weaving looms had now been diverted to the purposes of the society, which was enjoying the monopoly which had previously belonged to the company. In the circumstances prevailing, this spelt death to the company. A very significant situation arose in

August, 1953, when the first respondent found the commission weaving rates quoted by Mr. Schofield impossible of acceptance. When the secretary of the company wrote on Aug. 19: "As a result of this no production is being undertaken on behalf of this company and its activities are brought almost to a standstill", the society, at a board meeting on Aug. 24, decided to make no reduction in the commission charge. In its minute there appears this passage:

"Another factor which affects the situation is that increasing orders are being received from the merchant converting department of the drapery department and an increasing number of looms are being devoted to that work so that our manager does not feel himself pressed to cut his price to the limit as he was towards the end of last year when work was very difficult to get."

Lastly, on the facts, it is to be noted that, while the society's directors on the company who were also directors of the society knew all that was happening within the society, the respondents knew nothing apart from what they could infer from the communications, verbal and written, which they had received, with reference to the alignment of the shareholding and the taking over of shares from the respondents, and the general attitude of the society's directors on the company's board. On the vital matters affecting the company's prosperity known to the nominee directors, these directors remained silent, concealed the facts from the respondents and took no action and gave no advice helpful to the company. As LORD SORN put it, their conduct as directors was a negative one to "let the company drift towards the rocks."

My Lords, if the society could be regarded as an organization independent of the company and in competition with it, no legal objection could be taken to the actions and policy of the society. LORD CARMONT pointed this out in the Court of Session. But that is not the position. In law, the society and the company were, it is true, separate legal entities. But they were in the relation of parent and subsidiary companies, the company being formed to run a business for the society which the society could not at the outset have done for itself unless it could have persuaded the respondents to become servants of the society. This the respondents were not prepared to do. The company, through the knowledge, the experience, the connexions, the business ability and the energies of the respondents, had built up a valuable goodwill in which the society shared and which there is no reason to think would not have been maintained, if not increased, with the co-operation of the society. The company was in substance, though not in law, a partnership consisting of the society and the respondents. Whatever may be the other different legal consequences following on one or other of these forms of combination one result, in my opinion, followed in the present case from the method adopted, which is common to partnership, that there should be the utmost good faith between the constituent members. In partnership the position is clear. As stated in LINDLEY ON PARTNERSHIP (11th Edn.) p. 401:

"A partner cannot, without the consent of his co-partners, lawfully carry on for his own benefit, either openly or secretly, any business in rivalry with the firm to which he belongs."

It may not be possible for the legal remedies that would follow in the case of a partnership to follow here, but the principle has, I think, valuable application to the circumstances of this case.

In these circumstances, I have no doubt the conduct of the society was oppressive. The only question is, was it oppressive in the affairs of the company?

A At a previous stage of this case when relevancy was under consideration (1954 S.C. 381) the late Lord President, LORD COOPER, said (*ibid.*, at p. 391):

“The truth is that, whenever a subsidiary is formed as in this case with an independent minority of shareholders, the parent company must, if it is engaged in the same class of business, accept as a result of having formed such a subsidiary an obligation so to conduct what are in a sense its own affairs as to deal fairly with its subsidiary.”

B I would adopt this statement with this expansion that conducting what are in a sense its own affairs may amount to misconducting the affairs of the subsidiary. It is difficult to say that misconduct in the affairs of the subsidiary is not conduct in the affairs of the subsidiary and that, I think, is what LORD COOPER had in mind. Misconduct in the affairs of a company may be passive conduct, neglect of its interests, concealment from the minority of knowledge that it is material for the company to know. That, in my opinion, is what happened here. Nor do I think that what I have said is materially different from the views expressed by all their Lordships in the Court of Session. The Lord President (LORD CLYDE) (*1957 S.C. at p. 124*) considered that there was a policy by the society's nominees on the company's board of “uniform silence” in face of the progressive deterioration in the company's activities; of failure to disclose to the respondents the explanation of the deterioration; unwillingness to encourage the company to seek other manufacturers, leading to the conclusion that the society was extending to the conduct of the affairs of the company the same policy that was being operated by the society itself. LORD CARMONT considered that the society's nominees conducted the affairs of the company oppressively as from the time when, being aware of the society's policy, they continued to sit on the company's board and to control its affairs. He said (*ibid.*, at p. 136):

F “They could not in the circumstance of their relation to the society be anything other than active, or at best passive, supporters of the society's policy when dealing with the company's affairs, and even their continuance in office as directors of the company put an obstacle in the way of the minority taking early and perhaps some timely action to save the company, or at all events to maintain in whole or in part the value of the company's shares.”

G LORD RUSSELL held (*ibid.*, at p. 145) that they

“... acted in the interests of the society and against the interests of the company by adopting a policy of masterly inactivity and allowing the company's trading activities to decline to vanishing point.”

H LORD SORN's view (*ibid.*, at p. 154) was that the society, as majority shareholders controlling the company, made use of its control

“to ensure that the company remained passive under the attack and did not have an opportunity to struggle for its existence”;

I that they failed in their duty of raising the question of “looking for another source of supply as an urgent question of policy”; and that, when the policy of liquidation had been expressly approved by the society's board, “the nominee directors still did nothing and let the company drift towards the rocks.”

My Lords, these views indicate that the conduct of the society on the company's affairs was negative conduct. That, in a sense, is true, for it is just the other side of the shield from that which displayed the society acting positively to destroy the company. But I cannot think that, where directors, having power

to do something to save a company, lie back and do nothing, they are not conducting the affairs of the company, perhaps foolishly, perhaps negligently, perhaps with some ulterior object in view. They are certainly conducting the affairs of the company in breach of their duty as directors. In the present case I would go further, for I think that the production of rayon cloth at the mill was an affair of the company, and that the society, being majority shareholder in the company, cannot claim that, in diverting this production to itself and obstructing supplies to the company, it was acting for itself and not conducting the affairs of the company in a manner unfair and oppressive to the minority shareholders. It was said that the company should have secured its rayon cloth from the mill by a contract; but that is beside the point looking to the special relationship between the company and the society. A partner who starts a business in competition with the business of the partnership without the knowledge and consent of his partners is acting contrary to the doctrine of utmost good faith between partners. He is also acting in a manner which, I think, may be regarded as oppressive to his partners, for he is doing them an injury in their business. In the same way, there was here, in my opinion, oppression by the society of the minority shareholders and it was, I consider, oppression in the conduct of the affairs of the company. Oppression under s. 210 may take various forms. It suggests, to my mind, as I said in *Elder v. Elder & Watson* (1) (1952 S.C. 49), a lack of probity and fair dealing in the affairs of a company to the prejudice of some portion of its members. The section introduces a wide power to the court to deal with such a situation in an equitable manner which it did not have in the case of a company prior to the passing of the Act of 1948. The court has here acted, in my opinion, within the powers conferred on it.

It was said that appeal could not be made to s. 210 unless the company had a continuing life ahead of it, and here it was clear that the company would have to be wound-up. But that means that, if oppression is carried to the extent of destruction of the business of the company, no recourse can be had to the remedies of the section. This would be to defeat the whole purpose of the section. The present position is due to the oppression and, but for the oppression, it must be assumed that the company would be an active and presumably flourishing concern. The section is, in my opinion, very apt to meet the situation which has arisen.

It was contended that the value of £3 15s. put on the shares was excessive. I see no reason for altering this figure. LORD SORN has, in my opinion, approached this matter on a correct principle, by considering what would have been the value of the shares at the commencement of the proceedings had it not been for the effect of the oppressive conduct of which complaint was made. This is clearly not a matter on which a calculation can be made with mathematical accuracy or by the application of strict accounting principles, and the figure fixed by the court is well below the figure fixed by the auditors in February, 1952, and the price suggested by the first respondent in February, 1953.

I would dismiss the appeal.

LORD DENNING: My Lords, I had myself prepared a summary of the material facts in this case but, in view of the comprehensive statement by my noble and learned friend, LORD KEITH OF AVONHOLM, I will not burden your Lordships with what I had written. I would only say that I am sorry that the events of 1952 were excluded as irrelevant. The respondents from the very beginning put those events in the forefront of their complaints. They did so in the first letter of their solicitors dated Feb. 19, 1953, and in the original petition lodged on July 14, 1953. The burden of their complaints was that, when there was a recession in 1952 in the rayon trade, they—the respondents—tried, on

A behalf of the Scottish Textile and Manufacturing Co., Ltd. (hereinafter called
"the company"), to develop trade in other goods, particularly in the export of
woollen materials to Germany (where they had valuable trade connexions) and
in a large export order for £60,000; but that they were thwarted in their efforts
by the actions of two of the nominee directors, who tried to get the trade for
B the appellant society (hereinafter called "the society") itself. Whether these
complaints be true or not your Lordships cannot know—because these allega-
tions were excluded from probaton. But your Lordships have, I think, sufficient
material to decide the case on the other facts which were proved.

The complaints which were established were, I think, these: The society set
up a competing business. It established its own merchant converting department,
C engaged in the rayon trade itself, and quoted more favourable terms to its own
department than it did to the company. It is said that the society did this with
intent to injure the company—to depress the value of its shares so that the society
could get them cheap—but I would not, myself, go as far as this. It seems to
me that the society all the time was seeking to promote its own interests. It
was ready in 1946 to enlist the co-operation of the respondents when they were
D useful to it—so as to get an introduction into the rayon trade—but it was ready
to throw them over when they were no longer useful. By which I mean that it
was ready to withdraw all support from them. That was, I think, the state of
mind of the society right from the moment in November, 1951, when the res-
pondents refused to realign the shares at par. At that time the rayon trade was
in a recession, and the respondents were not of so much use to the society as
E they had been. By the time the rayon trade revived, the controls were off and
the society was able to engage in rayon production itself—and it had no further
need of the respondents or of the company. It had its own department for rayon.
So the company could go to the wall. It had "served its purpose"—or rather
the purpose of the society—and could be let go into liquidation. The society
had not the voting power to put it into voluntary liquidation. But liquidation
F might come about by sheer inanition. So it came about that, when the res-
pondents, in January, 1953, offered to sell their shares to the society at a price
to be negotiated (mentioning 96s.), the society refused "at the present time."
The society thought, perhaps, that if it waited, sooner or later liquidation
would come about, or that terms of purchase would be arranged later more
G favourable to the society than paying 96s. a share.

Such being "the matters complained of" by the respondents, it is said
"Those are all complaints about the conduct of the society. How do they touch
the real issue—the manner in which the affairs of the company were being
conducted?" The answer is, I think, by their impact on the nominee directors.
It must be remembered that we are here concerned with the manner in which
H the affairs of the company were being conducted. That is, with the conduct of
those in control of its affairs. They may be some of the directors themselves,
or, behind them, a group of shareholders who nominate those directors or whose
interests those directors serve. If those persons—the nominee directors or the
shareholders behind them—conduct the affairs of the company in a manner
oppressive to the other shareholders, the court can intervene to bring an end
I to the oppression.

What, then, is the position of the nominee directors here? Under the articles
of association of the company, the society was entitled to nominate three out
of the five directors, and it did so. It nominated three of its own directors and
they held office, as the articles said, "as nominees" of the society. These three
were, therefore, at one and the same time directors of the society—being three
out of twelve of that company—and also directors of the company—three out
of five there. So long as the interests of all concerned were in harmony, there

was no difficulty. The nominee directors could do their duty by both companies without embarrassment. But, so soon as the interests of the two companies were in conflict, the nominee directors were placed in an impossible position. Thus, when the realignment of shareholding was under discussion, the duty of the three directors to the company was to get the best possible price for any new issue of its shares (see per LORD WRIGHT in *Lowry v. Consolidated African Selection Trust, Ltd.* (2), [1940] 2 All E.R. 545 at p. 565) whereas their duty to the society was to obtain the new shares at the lowest possible price—at par, if they could. Again, when the society determined to set up its own rayon department, competing with the business of the company, the duty of the three directors to the company was to do their best to promote its business and to act with complete good faith towards it; and, in consequence, not to disclose their knowledge of its affairs to a competitor, and not even to work for a competitor, when to do so might operate to the disadvantage of the company (see *Hivac, Ltd. v. Park Royal Scientific Instruments, Ltd.* (3), [1946] 1 All E.R. 350) whereas they were under the self-same duties to the society. It is plain that, in the circumstances, these three gentlemen could not do their duty by both companies, and they did not do so. They put their duty to the society above their duty to the company in this sense, at least, that they did nothing to defend the interests of the company against the conduct of the society. They probably thought that, “as nominees” of the society, their first duty was to the society. In this they were wrong. By subordinating the interests of the company to those of the society, they conducted the affairs of the company in a manner oppressive to the other shareholders.

It is said that these three directors were, at most, only guilty of inaction—of doing nothing to protect the company. But the affairs of a company can, in my opinion, be conducted oppressively by the directors doing nothing to defend its interests when they ought to do something—just as they can conduct its affairs oppressively by doing something injurious to its interests when they ought not to do it. The question was asked: What could these directors have done? They could, I suggest, at least on behalf of the company, have protested against the conduct of the society. They could have protested against the setting up of a competing business. But then it was said: What good would that have done? Any protest by them would be sure to have been unavailing, seeing that they were in a minority on the board of the society. The answer is that no one knows whether it would have done any good. They never did protest. And it does not lie in their mouths to say it would have done no good, when they never put it to the test: see the decision of this House in *Morison v. Walton* (4) (May 10, 1909) unreported, but described by SCRUTTON, L.J., in *Coldman v. Hill* (5) ([1919] 1 K.B. 443 at p. 457). Even if they had protested, it might have been a formal gesture, ostensibly correct, but not to be taken seriously.

Your Lordships were referred to *Bell v. Lever Bros., Ltd.* (6) ([1932] A.C. 161 at p. 195), where LORD BLANESBURGH said that a director of one company was at liberty to become a director also of a rival company. That may have been so at that time. But it is at the risk now of an application under s. 210 if he subordinates the interests of the one company to those of the other.

So I would hold that the affairs of the company were being conducted in a manner oppressive to the respondents. The crucial date is, I think, the date on which the petition was lodged—July 14, 1953. If the respondents had at that time lodged a petition to wind-up the company compulsorily, the petition would undoubtedly have been granted. The facts would plainly justify such an order on the ground that it was “just and equitable” that the company should be wound-up: see *Re Yenidje Tobacco Co., Ltd.* (7) ([1916] 2 Ch. 426). But such an order would unfairly prejudice the respondents because they would only

A recover the break-up value of their shares. So, instead of petitioning for a winding-up order, they seek to invoke the new remedy given by s. 210 of the Companies Act, 1948. But what is the appropriate remedy? It was said that s. 210 only applies as an alternative to winding-up, and that an order can only be made under s. 210 if the company is fit to be kept alive; whereas, in this case, the business of the company was virtually at an end when the petition **B** was lodged, and there was no point in keeping it alive. If the society were ordered in these circumstances to buy the shares of the respondents, this would amount, it was said, to an award of damages for past misconduct—which is not the remedy envisaged by s. 210.

Now I quite agree that the words of the section do suggest that the legislature **C** had in mind some remedy whereby the company, instead of being wound-up, might continue to operate. But it would be wrong to infer therefrom that the remedy under s. 210 is limited to cases where the company is still in active business. The object of the remedy is to bring “to an end the matters complained of,” that is, the oppression, and this can be done even though the business of the company has been brought to a standstill. If a remedy is available **D** when the oppression is so moderate that it only inflicts wounds on the company, whilst leaving it active, so, also, it should be available when the oppression is so great as to put the company out of action altogether. Even though the oppressor by his oppression brings down the whole edifice—destroying the value of his own shares with those of everyone else—the injured shareholders have, I think, a remedy under s. 210.

E One of the most useful orders mentioned in the section—which will enable the court to do justice to the injured shareholders—is to order the oppressor to buy their shares at a fair price; and a fair price would be, I think, the value which the shares would have had at the date of the petition, if there had been no oppression. Once the oppressor has bought the shares, the company can survive. **F** It can continue to operate. That is a matter for him. It is, no doubt, true that an order of this kind gives to the oppressed shareholders what is, in effect, money compensation for the injury done to them; but I see no objection to this. The section gives a large discretion to the court, and it is well exercised in making an oppressor make compensation to those who have suffered at his hands.

G True it is that in this, as in other respects, your Lordships are giving a liberal interpretation to s. 210. But it is a new section designed to suppress an acknowledged mischief. When it comes before this House for the first time it is, I believe, in accordance with long precedent—and particularly with the resolution of all the judges in *Heydon's Case* (8) ((1584), 3 Co. Rep. 7a)—that your Lordships should give such construction as shall advance the remedy. And that is what your Lordships do today.

H I would dismiss the appeal.

Appeal dismissed.

Solicitors: *Martin & Co.*, agents for *Keyden, Strang & Co.*, Glasgow, and *Gray, Muirhead & Carmichael*, Edinburgh (for the appellant society); *Cole & Matthews*, agents for *Wilson, Chalmers & Hendry*, Glasgow, and *Hamilton, Kinnear & Beatson*, Edinburgh (for the respondents).

[Reported by G. A. KIDNER, Esq., Barrister-at-Law.]

FRY v. INLAND REVENUE COMMISSIONERS.

[COURT OF APPEAL (Lord Evershed, M.R., Romer and Ormerod, L.JJ.), July 1, 2, 3, 17, 1958.]

Estate Duty—Interest in expectancy—Option to defer payment of duty—Option exercised—Subsequent purchase of interest by tenant for life—Trust fund handed over to tenant for life—When “the interest falls into possession” —Property liable to duty—Finance Act, 1894 (57 & 58 Vict. c. 30), s. 7 (6).

A testator settled a fund by his will on trust, as events happened, for A with remainder to B absolutely. B predeceased A, and his executors exercised the option conferred by the Finance Act, 1894, s. 7 (6), to defer payment of estate duty on the reversionary interest until it should fall into possession. A subsequently purchased the reversionary interest from B's executors.

Held: estate duty became payable on the execution of the agreement to purchase the reversionary interest (for it was then that the interest fell into possession for the purposes of s. 7 (6) of the Finance Act, 1894) and the amount of duty was assessable on its value at that time.

Re O'Connor's Estate ([1931] I.R. 98) distinguished.

Decision of *DANCKWERTS, J.* ([1958] 1 All E.R. 819) reversed.

[**Editorial Note.** The simplification of the facts stated in the headnote is taken from the judgment at p. 92, letters C and D, post.

As to time for payment of estate duty in respect of an interest in expectancy, see 15 *HALSBURY'S LAWS* (3rd Edn.) 109, para. 231.

For the Finance Act, 1894, s. 7 (6), see 9 *HALSBURY'S STATUTES* (2nd Edn.) 363.]

Cases referred to:

- (1) *Re O'Connor's Estate, Hendrick v. Revenue Comrs.*, [1931] I.R. 98; Digest Supp.
- (2) *Coutts & Co. v. Inland Revenue Comrs.*, [1953] 1 All E.R. 418; [1953] A.C. 267; 3rd Digest Supp.
- (3) *Re Eyre*, [1907] 1 K.B. 331; 76 L.J.K.B. 227; 96 L.T. 236; 21 Digest 24, 135.
- (4) *Earl of Shrewsbury v. Inland Revenue Comrs.*, (1956), unreported.

Appeal.

This was an appeal by the plaintiff, the surviving executor of the will of Conrad Penrose Fry, deceased, from an order of *DANCKWERTS, J.*, dated Mar. 12, 1958, and reported [1958] 1 All E.R. 819, declaring that a contingent reversionary interest expectant on the death of Norah Lilian Cooke-Hurle, forming part of the estate of the said Conrad Penrose Fry, would fall into possession for the purpose of rendering the deferred estate duty payable in the said estate under the Finance Act, 1894, s. 7 (6), on the death of the said Nora Lilian Cooke-Hurle and not when she acquired the interest by purchase. By his notice of appeal the plaintiff sought declarations in the alternative of which one was that (b) it might be declared that (i) the contingent reversionary interest fell into possession for the purpose of s. 7 (6) on the date of the completion of the purchase and (ii) the value of the said interest when it fell into possession ought to be treated for the purposes of estate duty as equivalent to the sum of £39,750.

John Pennycuik, Q.C., and *R. Cozens-Hardy Horne* for the plaintiff.

R. O. Wilberforce, Q.C., and *E. Blanshard Stamp* for the defendants.

Cur. adv. vult.

July 17. **ROMER, L.J.**, read the following judgment of the court: This appeal raises a somewhat difficult question as to the construction of the Finance

A Act, 1894, s. 7 (6), which deals with the payment of estate duty on interests in expectancy.

B By his will dated Nov. 3, 1915, Francis Fry settled a share of his residuary estate on trust to pay the income thereof to Norah Lilian Cooke-Hurle (hereinafter called "Mrs. Cooke-Hurle") during her life and subject thereto on trust, in the event of Mrs. Cooke-Hurle having no issue, as to one quarter thereof for Conrad Penrose Fry. Francis Fry died on Nov. 4, 1918. Conrad Fry died on June 5, 1940, and the plaintiff, Sir Geoffrey Storrs Fry, is his surviving executor. Mrs. Cooke-Hurle, who was born on Jan. 3, 1871, is still living, is a widow and has had no issue. On the death of Conrad Fry his executors had an option under the Finance Act, 1894, s. 7 (6), either to pay the estate duty in respect of his reversionary interest under the will of Francis Fry expectant on Mrs. Cooke-Hurle's death without issue together with the duty in respect of the rest of Conrad Fry's estate or to postpone payment of duty until the interest should fall into possession. The executors elected to postpone payment of the duty until the interest should fall into possession.

D By an agreement dated June 22, 1954, the trustees of Conrad Fry's estate agreed to sell and Mrs. Cooke-Hurle agreed to buy for £39,750 the reversionary interest of Conrad Fry in Mrs. Cooke-Hurle's settled share of the residuary estate of Francis Fry. The purchase price was arrived at on an actuarial valuation made on the footing that no estate duty would be payable under Francis Fry's will on Mrs. Cooke-Hurle's death. The agreement was completed and the purchase price paid on or about Nov. 1, 1954. In addition to purchasing the reversionary interest of Conrad Fry in her settled share Mrs. Cooke-Hurle also agreed, by the same agreement, to purchase the other reversionary interests in her share. The result of the transaction was that Mrs. Cooke-Hurle became the owner of all the interests in remainder in her settled share, and as, in view of her age, there was no possibility of her thereafter having issue the trustees of Francis Fry's will transferred into her sole name the investments then comprised in her settled share of the residuary estate of Francis Fry. As a result of correspondence between the plaintiff's solicitors and the Estate Duty Office as to what (if any) estate duty had become payable, or would in the future become payable, by the estate of Conrad Fry by reason of the said agreement, the plaintiff, on Oct. 15, 1957, issued an originating summons asking for that and ancillary questions to be determined by the court. The matter came before DANCKWERTS, J., who, on Mar. 12, 1958, made a declaration

G "that having regard to the completion of the purchase on or about Nov. 1, 1954, by Norah Lilian Cooke-Hurle of the interest in the residuary estate of the late Francis James Fry to which the said Conrad Penrose Fry deceased was at the date of his death on June 5, 1940, contingently entitled in reversion expectant on the death of the said Norah Lilian Cooke-Hurle without issue the said contingent reversionary interest will fall into possession for the purpose of s. 7 (6) of the Finance Act, 1894, on the death of the said Norah Lilian Cooke-Hurle (if she dies without issue)."

H The plaintiff has appealed against that declaration.

Section 7 (6) of the Act of 1894 is in the following terms:

I "Where an estate includes an interest in expectancy, estate duty in respect of that interest shall be paid, at the option of the person accountable for the duty, either with the duty in respect of the rest of the estate or when the interest falls into possession, and if the duty is not paid with the estate duty in respect of the rest of the estate, then—(a) for the purpose of determining the rate of estate duty in respect of the rest of the estate the value of the interest shall be its value at the date of the death of the deceased; and (b) the rate of estate duty in respect of the interest when it falls into possession

shall be calculated according to its value when it falls into possession, together with the value of the rest of the estate as previously ascertained." A

"Interest in expectancy" is defined by s. 22 (1) (j) of the Act as including

"... an estate in remainder or reversion and every other future interest whether vested or contingent, but does not include reversions expectant upon the determination of leases." B

Counsel for the plaintiff and for the Crown were agreed before us that, having regard to Mrs. Cooke-Hurle's age in June, 1954, when she agreed to purchase Conrad Fry's reversionary interest, the contingency of her having issue could and should be disregarded; and accordingly that the case should be dealt with on the footing that the interest which Conrad Fry's executors had and which Mrs. Cooke-Hurle purchased from them was an indefeasibly vested, and not merely a contingent, remainder in Mrs. Cooke-Hurle's settled share. The question then which falls for decision can be posed as follows. A testator settles a fund on trust for A for life with remainder to B absolutely. B predeceases A and his executors exercise the option conferred by the Finance Act, 1894, s. 7 (6), to defer payment of duty on the reversionary interest until the interest falls into possession. A subsequently purchases the interest from B's executors. What duty (if any) falls to be paid by B's executors in consequence of the purchase, when is it payable and how should it be assessed? C D

It would seem that there are four possible answers to this question. The official view (which was upheld by the learned judge's declaration) is that no duty is payable by B's executors until the death of A and then that duty will become payable on the value of the fund as then existing. The alternative official view is that duty becomes payable on the execution of the sale agreement and that such duty is assessable on the value of the fund (and not merely on the value of the reversion) at the date of the agreement. The plaintiff contends that duty becomes payable on the execution of the sale agreement, but that such duty is only assessable on the then value of the reversionary interest. The plaintiff alternatively contends that no duty is payable or ever will become payable at all. There does not appear to be any decided case which has any direct bearing on the present problem. Reference was made to some observations by HANNA, J., in *Re O'Connor's Estate, Hendrick v. Revenue Comrs.* (1) ([1931] I.R. 98), but the circumstances of that case differed in a vital respect from those of the present. In *Re O'Connor* (1) real estate was devised on trust for A for life with remainder to his children as he should appoint and if there should be no son of A who should attain the age of twenty-one years then in trust for B. B died in A's lifetime and A (who was B's administrator and heir-at-law) postponed payment of estate duty in respect of B's contingent interest. Subsequently A died without issue and a question arose as to the liability of B's estate to payment of duty in respect of B's interest in the devised land. It was held that the Revenue Commissioners were entitled to claim estate duty on the death of B in respect of his contingent estate in the lands which passed on his death to A and that the rate of duty was to be calculated according to the value of that interest when it fell into possession on the death of A together with the value of the rest of B's estate. In the course of his judgment HANNA, J., said (*ibid.*, at p. 108): E F G H I

"In my opinion, an interest in expectancy, within the meaning of the Act, whether it be in remainder or reversion, or whether vested or contingent. 'falls into possession' within the meaning of s. 7 (6) when the events which rendered it in expectancy have happened, and there has accrued an immediate right to present enjoyment of the property by actual occupation, or receipt of rents and profits... The death of [A] is the event which, under

- A** the option given by s. 7 (6) makes the duty on the death of [B] alternatively leviable and payable . . . ”

We do not derive much assistance from these observations in the present case. The point which is now before us does not appear to have been argued, and in any event B's reversionary interest remained contingent down to the date of A's death, whereas in the present case Conrad Fry's reversionary interest had become vested, by reason of Mrs. Cooke-Hurle's age, at the time when she acquired it. It clearly cannot be contended that a contingent reversionary interest ripens into an interest in possession unless and until the contingency occurs; but different considerations may well arise where, as here, the reversionary interest is vested and indefeasible.

- C** The question, then, before us is free from authority and falls to be determined on the meaning and effect of the language of s. 7 (6) of the Act. The sub-section is not drafted with strict accuracy on any view of the matter. It speaks of an interest in expectancy falling into possession, whereas such an interest always is in possession from the date when the instrument which creates it takes effect. What does, or may, fall into possession is the property in respect of which the interest in expectancy has been created; and it was presumably in that sense that the legislature referred to the interest itself falling into possession. Apart altogether from this inaccuracy of language the provisions of the sub-section are by no means easy to apply to cases where a life tenant sells or voluntarily surrenders his life interest to the remainderman or where, as here, the life tenant purchases the interest of a deceased reversioner; and it is, we think, a fair assumption that in fact the draftsman of the sub-section had no such possibilities in mind.

As we have previously indicated, the official view of the Crown is that where a life tenant purchases a vested reversion in the settled property, and payment of duty had been postponed, in pursuance of the statutory option, on the reversioner's death, the resulting coalescence of interests should be disregarded for

- F** relevant purposes and that no duty becomes payable until the life tenant actually dies. Counsel for the Crown frankly conceded that this view may lead to difficulties and inconvenience, but he submitted that it is justified by the language in which the sub-section is framed. The contention is that an interest in expectancy “falls into possession” when that event occurs on the happening of which the interest was expectant in accordance with the terms of the instrument which created the interest. The Crown's submission is that the word “falls” in the material phrase points in the direction of some external event which is going to happen and not in the direction of some artificial event brought about by the beneficiaries themselves; in other words, and putting it more shortly, the official attitude is to adhere to the trusts of the settlement. Section 7 (6), submitted counsel for the Crown, is only concerned with fixing a date. That
- H** date is the date of an event prescribed by the instrument and a reversionary interest cannot “fall into possession” until that event has happened, even though the life tenant acquires it previously. Counsel for the plaintiff, on the other hand, pointed out some of the results which would necessarily follow if the official view were adopted. He said that supposing a life tenant bought a vested reversion from the reversioner's executors, had the settled fund transferred
- I** to him and died some twenty or thirty years later it would be virtually impossible at his death to ascertain of what the fund consisted and what its then value was. The fund, even if traceable (and assuming the Crown were entitled to trace it into other assets for the purpose of fixing the reversioner's estate with duty), might have been invested so skilfully by the tenant for life as to have doubled or trebled in value by the time of his death. On the other hand, the life tenant might have spent it all or become bankrupt. There could accordingly be no certainty as to, and no means of ascertaining, the amount of duty which the

executors might have to pay or the time when they would have to pay it; and when the time for payment did fall due the amount of the duty might well exceed the price for which the executors had sold the reversion. Counsel for the plaintiff then suggested that the official view, if adopted, would logically have to be applied to the converse case of the reversioner acquiring the life tenant's interest, and would lead to similarly extraordinary results. If, submitted counsel, a life tenant surrenders his life interest to the reversioner, or the reversioner buys the life interest, and the reversioner survives the life tenant by twenty years, it would be impossible to suggest that the reversion fell into possession on the death of the life tenant; for it would already have fallen into possession (in the sense of the property falling into the reversioner's possession) twenty years before. Yet such would be the effect of applying the official view.

Counsel for the plaintiff contended that the difficulties of adopting the construction of the sub-section which the Crown have submitted go most of the way towards showing that it cannot be right. The plaintiff's own case is that either Conrad Fry's reversion fell into possession when Mrs. Cooke-Hurle agreed to buy it or it will never fall into possession at all. Although the latter of these alternatives would be the most favourable to the plaintiff he only put it forward as subordinate to the first. As to this counsel submitted that on signing the sale agreement Mrs. Cooke-Hurle became entitled, by virtue of the instrument which created the interest in expectancy, to the right to have possession of and dispose of the property in which the interest subsisted. His argument was, in summary, as follows: The enlargement of Mrs. Cooke-Hurle's enjoyment of the income of the fund into an absolute power of disposition can reasonably be said to constitute a "falling into possession" of the interest in expectancy. Before that enlargement took place it could be said that the reversion would fall into possession in futuro, but such could no longer be said after the life tenant had acquired it; it in fact fell into possession in the hands of the tenant for life, as the reversioner's assign, when she bought the interest, for thereupon the funds in which the interest had previously subsisted became transferable to her as her sole and absolute property. In the ordinary case, said counsel for the plaintiff, of property being settled on trust for A for life with remainder to B absolutely the settlement is at an end when the two interests coalesce; and there is no difference between that case and the present, where the tenant for life is past child-bearing and becomes entitled to have the trust fund handed over to her. The interests coalesce, the settlement ceases and so does the trust fund as such.

It seems to us that on the language of s. 7 (6) neither the view of the Crown nor that of the plaintiff can be said to be obviously wrong. The court then, when faced with two possible constructions of legislative language, is entitled to look to the results of adopting each of the alternatives respectively in its quest for the true intention of Parliament. In *Coutts & Co. v. Inland Revenue Comrs.* (2) ([1953] 1 All E.R. 418 at p. 421) LORD REID said:

"In general, if it is alleged that a statutory provision brings about a result which is so startling one looks for some other possible meaning of the statute which will avoid such a result, because there is some presumption that Parliament does not intend its legislation to produce highly inequitable results."

It does not seem to us that there is any satisfactory answer to such difficulties as those to which counsel for the plaintiff referred which are involved in the view that duty, in such cases as the present, does not become payable until the death of the tenant for life and that it is then exigible on the value of the whole settled fund as then existing. Such a view, moreover, would possibly run counter to the general principle that an executor should pay duty at the time when he has money in hand with which to pay it. This principle would be satisfactorily

A applied in such cases as the present (subject to the next question which falls to be considered) if the date of payment of the duty is the date of the sale agreement; for the reversioner's executor has the purchase price in hand with which to pay an immediately ascertainable duty. In our judgment, accordingly, the contention of the plaintiff, which is at least as acceptable on the mere question of construction as that of the Crown, is preferable in its results and effect should, therefore, be given to it. On that view of the matter the subordinate contention of the plaintiff that no duty is payable at all does not succeed; and beyond observing that it would be somewhat startling if payment of duty could be avoided altogether by the simple expedient of a life tenant purchasing a deceased reversioner's interest in expectancy from executors who had exercised the option conferred by s. 7 (6) we need say no more about it.

C On the footing, then, that Conrad Fry's interest in expectancy fell into possession when Mrs. Cooke-Hurle agreed to buy it the next question that arises is as to the assessment of the duty which became payable by his executor, the plaintiff. The Crown contends that duty became payable on the value of the whole fund. The plaintiff submits that, for purposes of duty the interest should be taken at its then value as a reversion and that duty is only exigible in respect of that value.

D It was decided in *Re Eyre* (3) ([1907] 1 K.B. 331), and is now the established practice, that where under s. 7 (6) of the Act an executor of a deceased reversioner has exercised the option thereby given and deferred the payment in respect of the interest in expectancy until that interest has fallen into possession, the amount on which the duty is payable is the value of the interest when it has fallen into possession, and not merely its value on the death of the deceased. The Crown says that the plaintiff cannot have it both ways and that if he succeeds in establishing that Conrad Fry's interest in expectancy fell into possession when Mrs. Cooke-Hurle agreed to buy it then he must take the consequences and one of such consequences is that the principle of *Re Eyre* (3) applies. Counsel for the Crown submitted that as the parties chose to accelerate the falling into possession of Conrad Fry's interest they must abide by the results and the executor must pay duty on the footing that the whole fund did in fact fall into possession in the hands of Mrs. Cooke-Hurle, as Conrad Fry's assign; and that the assumption that her life interest still continued to exist cannot co-exist with the assumption that the reversionary interest had fallen into her possession. Junior counsel for the Crown submitted that a vested reversionary interest ripens sooner or later into the right to possession of the property in which the interest has been created, and the reversioner's executor is entitled to postpone payment of duty until he (or his assign) has acquired such possession; that it is irrelevant how possession is acquired or if it is acquired prematurely, for example by surrender of the life tenant's interest; and that in the present case Mrs. Cooke-Hurle, as assign of the reversioner, did get possession of the property, albeit prematurely.

G The plaintiff, on the other hand, contends that what has to be valued, and that which attracts liability to duty, is the interest in expectancy at the moment of time when it fell into possession. At the life tenant's death, it is said, the value of the reversion is the value of the property itself, for no prior interest stands in its way; but that in the present case there were two interests which coalesced in Mrs. Cooke-Hurle's hands, viz., her life interest and the reversionary interest which she bought, and that the value of the property is not solely represented by the interest in expectancy but is the sum of that interest and the life interest. It was submitted that Mrs. Cooke-Hurle has not given up her life interest; that merger is a question of intention and the amount of duty payable could not depend on whether Mrs. Cooke-Hurle did or did not make a declaration against merger when she bought the reversionary interest.

The case for the Crown on this point is certainly not without attraction and makes a logical appeal. Nevertheless it could lead to unexpected consequences,

some of which were pointed out by counsel for the plaintiff. He suggested by way of illustration the case of a young tenant for life of a fund worth £100,000, buying for £10,000 the interest of a deceased reversioner, whose executors had exercised the option conferred by s. 7 (6). In such a case the executors, though receiving only £10,000, would be liable to duty on the full value of the fund, namely, £100,000. Counsel for the Crown's answer to this was that the executors need not enter into such a transaction and must accept the consequences if they do. This is true; but they might find it necessary to sell the reversion and obviously the highest bidder for it would be the life tenant, for he is the only person on whose death no duty would become payable in respect of it. We cannot think that in counsel for the plaintiff's illustration the Crown's claim would be in accord with the intention of s. 7 (6) of the Act. It seems to us that such a claim would be wholly inequitable and we would again refer to LORD REID's observations in *Coutts & Co. v. Inland Revenue Comrs.* (2) already cited. In our opinion that which became subject to duty was that which Mrs. Cooke-Hurle bought, viz., the interest in expectancy; and it would be quite wrong to say that for the purposes of valuing that interest Mrs. Cooke-Hurle's pre-existing right to enjoy the income of the fund for the rest of her life should be disregarded. That which has to be valued, in our judgment, was that which she did not possess before and not the aggregate of that and her own life interest. As we say, we are conscious of the difficulty of reconciling the view that Conrad Fry's reversionary interest fell into possession when Mrs. Cooke-Hurle agreed to buy it with the further view that for the purpose of valuation it had to be treated as still being an interest in remainder. As we have already indicated, however, such a transaction as that now under consideration was not apparently contemplated by the draftsman of the Act, who at all events failed to make any express provision for it. In the circumstances the court must do the best it can to apply the relevant legislation to particular, and apparently unforeseen, facts—as it did in 1956 in the case (unreported) before this court of the *Earl of Shrewsbury v. Inland Revenue Comrs.* (4). In so applying s. 7 (6) of the Act to the facts of the present case we are satisfied that the reconciliation to which we have referred can be achieved without subjecting the language of the sub-section to an illicit strain, and should be achieved in the interests of justice. In our judgment, accordingly, the appeal should be allowed.

Appeal allowed. Declaration in terms of (b) (i) and (ii) of notice of appeal; substituting "date of contract" for date of completion; and substituting figure to be agreed for the sum specified.

Solicitors: *Rider, Heaton, Meredith & Mills*, agents for *Osborne, Ward, Vassall, Abbot & Co.*, Bristol (for the plaintiff); *Solicitor of Inland Revenue.*

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

A **Re COOPER (A BANKRUPT). *Ex parte* TRUSTEE OF THE PROPERTY OF THE BANKRUPT v. REGISTRAR AND HIGH BAILIFF OF THE PETERBOROUGH AND HUNTINGDON COUNTY COURTS.**

[CHANCERY DIVISION (Danckwerts and Upjohn, JJ.), July 14, 1958.]

B *Bankruptcy—Execution—Notice of receiving order served on sheriff after goods taken in execution but before execution completed—Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 26 (1)—Bankruptcy Act, 1914 (4 & 5 Geo. 5 c. 59), s. 41 (1).*

C In May and June, 1957, judgment creditors of a farmer obtained warrants of execution, issued in Huntingdon County Court, and the warrants were delivered to the sheriff for execution. On July 4, 1957, the sheriff's officer went to the debtor's farm and, as the debtor was not there, handed to an employee of the debtor two sets of forms, one stating that execution had been levied on two tractors, and the other inviting the debtor to agree to walking possession. The employee was asked to give the forms to the debtor. Arrangements were then made by the county court clerk for the tractors to be removed. On July 10 the debtor filed his petition in bankruptcy and, on the same day, a receiving order and an adjudication order were made in Peterborough County Court. On July 11, before notice of the orders had been given to the sheriff, the sheriff's officer went to the debtor's farm and seized the tractors, which were removed by transporters. On July 12 the official receiver asked for the return of the tractors which were returned immediately. By a written notice, dated July 12, the sheriff was informed of the receiving order. The sheriff sought to recover from the debtor's trustee in bankruptcy the costs (amounting to over £70) incurred by him in the execution of the warrants.

E **Held:** the sheriff was entitled to the costs which he had incurred for the following reasons—

F (i) under s. 26 (1)* of the Sale of Goods Act, 1893, the right to seize given by the writs of execution remained effective against everyone except a purchaser for value without notice; and

G (ii) as the goods were taken in execution before notice of the receiving order was served on the sheriff but the execution had not been completed before notice was served, s. 41 (1)† of the Bankruptcy Act, 1914, applied, and, although the sheriff was required to return the goods, he was entitled under the sub-section to the costs of the execution.

Per DANCKWERTS, J. (UPJOHN, J., not assenting): on the facts, the goods were taken in execution on July 4, 1957 (see p. 99, letter H, and p. 101, letter G, post).

H [As to the costs of the execution where completion of the execution is prevented by the debtor becoming bankrupt, see 16 HALSBURY'S LAWS (3rd Edn.) 34, para. 48.

For the Sale of Goods Act, 1893, s. 26 (1), see 22 HALSBURY'S STATUTES (2nd Edn.) 1002.

I For the Bankruptcy Act, 1914, s. 40 (1), s. 41 (1), see 2 HALSBURY'S STATUTES (2nd Edn.) 376, 377.]

Cases referred to:

(1) *Lumsden v. Burnett*, [1898] 2 Q.B. 177; 67 L.J.Q.B. 661; 78 L.T. 778; 21 Digest 510, 857.

(2) *Re Davies, Ex p. Williams*, (1872), 7 Ch. App. 314; 41 L.J.Bey. 38; 26 L.T. 303; 36 J.P. 484; 5 Digest 832, 7051.

* The terms of s. 26 (1) of the Act of 1893 are printed at p. 100, letter B, post.

† The terms of s. 41 (1) of the Act of 1914 are printed at p. 101, letter B, post.

Motion.

This was an appeal by the trustee in bankruptcy of John Thomas Cooper (referred to hereinafter as "the debtor") from an order made by His Honour JUDGE LAWSON CAMPBELL, sitting in bankruptcy at Peterborough County Court, on Apr. 17, 1958. The respondent was the registrar and high bailiff of the Peterborough and Huntingdon County Courts. The trustee in bankruptcy moved for (i) an order to set aside (a) the finding of the learned judge that the respondent was entitled to the protection afforded by s. 41 of the Bankruptcy Act, 1914, relating to certain executions enforced by him as high bailiff at the Huntingdon County Court of warrants issued out of that court on the goods of the debtor, and (b) the direction of the judge that the costs of the said executions be taxed by the registrar of the Cambridge County Court and paid by the trustee out of the assets of the debtor; and (ii) a declaration that the respondent was not entitled to recover any sum in respect of the costs of the said executions against the goods purporting to be seized thereunder, or against the goods of the debtor generally, or to be paid any sum in respect of such costs out of the assets of the debtor.

The debtor was a farmer. On May 15, 1957, a judgment creditor of the debtor obtained a warrant of execution in Huntingdon County Court. On June 11, 1957, another judgment creditor of the debtor obtained a warrant of execution in Biggleswade County Court, and this warrant was re-issued from Huntingdon County Court on June 13. The total amounts to be levied under the warrants were £146 6s. 5d. and £11 8s. 6d. The bailiff of Huntingdon County Court went to the debtor's house on several occasions in order to execute the warrants, but on each occasion was unsuccessful in seeing the debtor. On July 4, 1957, he again went to the debtor's house and, failing to find him there, handed to an employee of the debtor two forms (one in respect of each of the warrants) informing the debtor that execution had been levied on two of his tractors, and also two forms "Ex. 36" (being requests to hold walking possession). The employee was asked to hand the forms to the debtor with a request that the debtor would sign the forms Ex. 36 and return them to the bailiff. After the bailiff had reported to the clerk of the county court that he had left the forms, arrangements were made by the clerk for the tractors to be removed from the farm on July 11, to be sold by auction.

On July 10, 1957, the debtor filed his own petition in bankruptcy, and a receiving order and an adjudication order were made on the same day in Peterborough County Court. On July 11, in good faith, the respondent not having received notice of the receiving order, the bailiff went to the debtor's farm and proceeded to seize the two tractors, which were then taken away on two transporters pursuant to the arrangements made by the clerk. On July 12 the official receiver communicated by telephone with the county court and asked for the return of the tractors. Instructions were immediately given for the tractors to be returned. By a written notice of the same date (and received at the county court on the following day), the official receiver informed the respondent of the receiving order. In a letter dated Aug. 6, 1957, the respondent submitted to the trustee a bill, amounting to over £70, for the costs incurred by him in the execution of the warrants (the costs of the removal and return of the tractors being £67). The respondent having been asked to bring in his bill for taxation, the matter was referred to the county court judge and came before him, in chambers, on Mar. 10, 1958. On Apr. 17, 1958, the county court judge made the order from which the trustee now appealed.

B. J. H. Clauson for the appellant, the trustee in bankruptcy of the debtor.

Denys B. Buckley for the respondent, the registrar and high bailiff of Peterborough and Huntingdon County Courts.

A **DANCKWERTS, J.:** This is a case which raises some rather interesting points in the law of bankruptcy. It relates to the bankruptcy of a farmer. [HIS LORDSHIP stated the facts, and continued:] Two questions arise. One is purely a question of fact. The other is a more interesting question of law. The first question to decide is: Was there an effective seizure in execution on July 4, 1957, in the circumstances of this case?

B It appears from the cases that it is not necessary that the actual goods be taken into possession by the sheriff's officer. Also it is not necessary that he should retain possession of the goods. What is known as a "walking possession" has become rather more common than it used to be in the old days, because of the difficulty of getting appropriate persons to remain in possession of the goods, largely, perhaps, because of the economic situation. There is certainly one authority which would show that very little in the way of actual seizure would be sufficient to satisfy the requirements of delivery in execution. I refer to *Lumsden v. Burnett* (1) ([1898] 2 Q.B. 177). That was a case of a distress in respect of income tax where the distress was claimed to have been levied on eight pairs of trousers, which were never actually taken into possession by the tax collector, nor did he retain possession of them. He received a document signed by a girl about thirteen years of age. The document was, of course, of no value whatever, but, none the less, it was held that the tax collector had effected execution and that the execution had not been abandoned, although the most that the tax collector did was to have the premises visited occasionally by one of his men to see whether the goods had been removed from the premises. The point of that case was a different one from that in the present case. The point there was whether, in the circumstances, the income tax collector could charge half a crown a day on the footing that his man had been in possession, which, in actual fact, he had not, and, therefore, it was held that the tax collector could not recover the half a crown a day. That case indicates, however, the way in which very simple acts would be sufficient to satisfy the requirements of the taking of possession and the retaining of possession. It is, in each case, a question of fact, and the abandonment of possession, if the possession has been taken, is also a question of fact. It seems to me that in the present case the requirements were sufficiently satisfied by the sheriff's officer coming on the farm and indicating to an employee of the debtor that he was levying an execution on the two tractors.

G In my opinion, the subsequent events entirely negatived any intention to abandon the possession which was originally taken, because everything was consistent with completing the process of execution, the sheriff's officer informing the clerk to the court, the clerk to the court making the arrangements for the taking away of the tractors, and the final removal of the tractors on July 11, 1957, without notice of the receiving order, although information, without any notice, had been received, on July 11, 1957*.

H I should, therefore, be prepared to find, if I had to decide the case on that ground, that there was a taking in execution on July 4, 1957. There is also, however, the other point, which is on the footing that the only taking in execution was on July 11, 1957. That was after the receiving order and after the adjudication, which had been made the preceding day, but it was before notice of those orders had reached the sheriff. It was contended on behalf of the trustee in bankruptcy that any title by execution in those circumstances could not prevail over the title of the trustee in bankruptcy, in whom the property vested under s. 53 (1) of the Bankruptcy Act, 1914, on the adjudication in

* It was deposed in evidence, on behalf of the trustee, that the bailiff received information of the receiving order from a neighbour of the debtor on July 11, before the tractors were actually removed.

bankruptcy. The legal position is that the effect of the execution primarily depends on s. 26 (1) of the Sale of Goods Act, 1893, which reads: A

“ A writ of fieri facias or other writ of execution against goods shall bind the property in the goods of the execution debtor as from the time when the writ is delivered to the sheriff to be executed; and, for the better manifestation of such time, it shall be the duty of the sheriff, without fee, upon the receipt of any such writ to indorse upon the back thereof the hour, day, month, and year when he received the same. Provided that no such writ shall prejudice the title to such goods acquired by any person in good faith and for valuable consideration, unless such person had at the time when he acquired his title notice that such writ or any other writ by virtue of which the goods of the execution debtor might be seized or attached had been delivered to and remained unexecuted in the hands of the sheriff.” B
C

The effect of that would seem to be that the title or right given by virtue of the writ remains effective not only against the goods in the hands of the original debtor but also against any transferee other than a purchaser in good faith and for value. Therefore, prima facie, it would have appeared that the writ would be effective against the trustee in bankruptcy, who does not give value but merely claims title by process of law. D

Counsel for the trustee relied on *Re Davies, Ex p. Williams* (2) ((1872), 7 Ch. App. 314), which was decided on s. 12 of the Bankruptcy Act, 1869, and which supports his argument to some extent. That case was on a different section of a different Act, and it referred to a petition for liquidation, and not to the making of a receiving order, although the provisions which are contained in that section of the Act of 1869 are more similar to the provisions in regard to the effect of a receiving order which are to be found in s. 7 of the Bankruptcy Act of 1914. Section 7 (1) of the Bankruptcy Act, 1914, reads: E

“ On the making of a receiving order an official receiver shall be thereby constituted receiver of the property of the debtor, and thereafter, except as directed by this Act, no creditor to whom the debtor is indebted in respect of any debt provable in bankruptcy shall have any remedy against the property or person of the debtor in respect of the debt, or shall commence any action or other legal proceedings, unless with the leave of the court and on such terms as the court may impose.” F
G

Section 7 (2) provides for the position of a secured creditor, which is irrelevant for this purpose. Section 7 (1) does not say: “ Subject to the provisions of this Act ”, but I think that that is obviously to be inferred. Therefore I turn to s. 40 and s. 41 which are headed: “ Effect of bankruptcy on antecedent and other transactions ”. Section 40 deals with a completed execution. Section 40 (1) reads: H

“ Where a creditor has issued execution against the goods or lands of a debtor, or has attached any debt due to him, he shall not be entitled to retain the benefit of the execution or attachment against the trustee in bankruptcy of the debtor, unless he has completed the execution or attachment before the date of the receiving order, and before notice of the presentation of any bankruptcy petition by or against the debtor, or of the commission of any available act of bankruptcy by the debtor.” I

The result of that is that incompleted executions are ineffective and the property has to be brought into the bankruptcy. But completed executions, by inference, are protected against the effect of the bankruptcy, and the benefit is then retained by the execution creditor.

A It seems to me that s. 41 deals with a different situation and that is where the execution has not been completed. Section 41 (1) provides:

B “Where any goods of a debtor are taken in execution, and before the sale thereof, or the completion of the execution by the receipt or recovery of the full amount of the levy, notice is served on the sheriff that a receiving order has been made against the debtor, the sheriff shall, on request, deliver the goods and any money seized or received in part satisfaction of the execution to the official receiver, but the costs of the execution shall be a first charge on the goods or money so delivered, and the official receiver or trustee may sell the goods, or an adequate part thereof, for the purpose of satisfying the charge.”

C It is on the second part of that sub-section that the respondent in the present case relies. It seems to me that counsel for the respondent is right when he suggests that the provisions of that sub-section may well refer to the taking of goods of a debtor in execution after the date of the receiving order, because the sub-section refers to notice being given of a receiving order having been made, and, of course, it applies equally well to a case where the taking of the goods of a debtor has been before the date of the receiving order but where the execution has not been completed. It seems to me to deal equally well with both situations and I think that the provision is intended to produce a fair result where the sheriff, or his officer, has proceeded in execution, not knowing that a receiving order has been made, or, at any rate, not having received any notice in writing that a receiving order had been made. Consequently, it seems to me that the terms of s. 41 (1) apply to the present case where the goods were taken in execution on July 11, and not before, in complete ignorance of the making of the receiving order and adjudication, and that the sub-section gives the judgment creditor the right to have his costs provided for out of the property of the bankrupt in the circumstances which have arisen. I think, therefore, F that the appeal must fail on both the grounds which I have mentioned.

UPJOHN, J.: I agree that this appeal fails. As my Lord has said, two points arise. The first is purely a question of fact, that is to say, whether the sheriff or the bailiff effectively seized the two tractors on July 4, 1957, and, if he did so, whether before the date of adjudication he abandoned possession of the tractors. I think that that is a very difficult question of fact and, with all respect to the judgment which has just been delivered, I must not be taken as assenting to it on this part of the case. I find it unnecessary to express any conclusion on it, because I agree with what DANCKWERTS, J., has said in regard to the second point, that is to say, whether there was an effective seizure under the Bankruptcy Act, 1914, s. 41 (1): effective, that is to say, for this purpose, H that the judgment creditor has a claim under s. 41 (1) for the costs of the seizure. Counsel for the trustee invited us to take the view that s. 41 (1) had no application because when the seizure was made on July 11, 1957, the goods in question were no longer the goods of the debtor: they had vested, he argued, in the official receiver. No doubt they had, but that circumstance, in my view, is I irrelevant. As DANCKWERTS, J., pointed out, the right to seize given by s. 26 of the Sale of Goods Act, 1893, remains valid and effective against everyone but a purchaser for value without notice. Therefore, the fact that the goods have vested in the official receiver matters not, so far as the vesting provisions are concerned; the plaintiff would still have a prior right to seize.

I therefore accept the argument of counsel for the respondent that one must look to see in s. 7, s. 40 and s. 41 of the Act of 1914, how far, if at all, the right to seize is effective. It is quite plain, when one looks at s. 40 (1), that, as the

seizure was not completed, the execution was not completed before the date of the receiving order, and that it must be treated as for the benefit of the bankruptcy. When one comes to s. 41, it is, I think, significant that the test changes. Section 40 (1) starts: "Where a creditor has issued execution". The opening words of s. 41 (1) are: "Where any goods of a debtor are taken in execution", and then the sub-section goes on: "and before the sale thereof . . . notice is served on the sheriff that a receiving order has been made . . .". I agree with my Lord in thinking that the terms of s. 41 (1) are applicable to an execution before or after a receiving order or adjudication. All that is required is that, if goods are taken in execution and a notice is served on the sheriff that a receiving order has been made, certain results flow. One is that the sheriff must hand over any goods or money; but he has this benefit, that the costs of the execution are to be a first charge on the goods or money so delivered. I, agree, therefore that this appeal fails.

Appeal dismissed.

Solicitors: *Kingsford, Dorman & Co.*, agents for *Buckle & Co.*, Peterborough (for the appellant); *Treasury Solicitor* (for the respondent).

[*Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.*]

Re COLE (*deceased*). WESTMINSTER BANK, LTD. AND ANOTHER v. MOORE AND ANOTHER.

[COURT OF APPEAL (Lord Evershed, M.R., Romer and Ormerod, L.J.J.), June 9, 10, July 17, 1958.]

Charity—Children's home—Home maintained by local authority—Temporary home for orphans, and children committed to local authority as a fit person—Gift for general benefit and general welfare of the children—Children and Young Persons Act, 1933 (23 Geo. 5 c. 12), s. 57, s. 62, s. 63, s. 64 (as amended), s. 66, s. 67, s. 68—Children Act, 1948 (11 & 12 Geo. 6 c. 43), s. 1, s. 15, s. 23, s. 24.

Administration of Estates—Gift cum onere—Real property subject to mortgages by deposit—Specific devise of part of realty so subject—Whether contrary intention within Administration of Estates Act, 1925 (15 & 16 Geo. 5 c. 23), s. 35 (1).

The testator by his will dated Dec. 24, 1952, specifically devised two freehold houses on trust, "to apply the income arising therefrom . . . for the general benefit and general welfare of the children for the time being in [S. House] . . . as a small token of my appreciation of the work carried on at such house . . . I desire that the superintendent for the time being of [S. House] should be consulted with a view to ascertaining his views as to the allocation of the before mentioned income". The testator died on Apr. 5, 1955. S. House was a home provided and maintained by a local authority pursuant to the Children Act, 1948, s. 15, for the accommodation of children in its care either under s. 1 of the Act of 1948 or under the Children and Young Persons Act, 1933, s. 57, s. 62, s. 63, s. 64 (as amended), s. 66, and s. 67. The home provided accommodation for up to thirty children of either sex between the ages of five and fifteen. A child might remain there for periods ranging from a few weeks to about two years. The cost of main-

A taining the children was provided partly from grants of money by Parliament and partly from contributions received from parents under s. 23 and s. 24 of the Act of 1948 and s. 86 of the Act of 1933. The classes of children admissible by virtue of the two Acts included orphans, or children abandoned by their parents, children committed to the local authority as a "fit person" including children found guilty of offences punishable in the case of an adult with imprisonment and children exposed to moral danger or beyond the control of their parents. The question arose whether the devise was for a charitable purpose.

B A further question, not necessary to be decided in view of the decision reached on the first question, arose, viz., whether the specific devise of the two freehold properties, which, together with a third property, which was not specifically devised, the testator had charged by memoranda of deposit with payment of a debt, indicated a contrary intention within s. 35 (1) of the Administration of Estates Act, 1925, so as to exclude its application.

C **Held** (LORD EVERSHED, M.R., dissenting): while a gift for the endowment or maintenance of S. House might be charitable, the present gift "for the general benefit and general welfare" of the children for the time being in S. House was not charitable because the terms of the gift permitted the application of income for non-charitable objects, e.g., the purchase of a television set for the benefit of delinquent or refractory children.

D Per LORD EVERSHED, M.R. (on the further question stated above): it does not appear that *Sackville v. Smythe* ((1873), L.R. 17 Eq. 153) and *Re Smith* ((1886), 33 Ch.D. 195) were cited to HARMAN, J., in *Re Biss* ([1956] 1 All E.R. 89). Had they been so cited, it is possible that HARMAN, J., would have decided the case otherwise than as he did (see p. 114, letter H, post; cf. per ROMER, L.J., at p. 108, letter B, post).

E Appeal dismissed.

F [As to gifts for non-charitable public purposes, see 4 HALSBURY'S LAWS (3rd Edn.) 241, para. 522; and for cases on the subject, see 8 DIGEST (Repl.) 349-351, 296-311.]

For the Children and Young Persons Act, 1933, s. 57, s. 62, s. 63, s. 64, s. 66, s. 67, and s. 68, see 12 HALSBURY'S STATUTES (2nd Edn.) 1013, 1015-1020.

For the Children Act, 1948, s. 1, s. 15, s. 23 and s. 24, see 12 HALSBURY'S STATUTES (2nd Edn.) 1105, 1116, 1121.]

G Cases referred to:

(1) *Chichester Diocesan Fund & Board of Finance (Incorporated) v. Simpson*, [1944] 2 All E.R. 60; [1944] A.C. 341; 113 L.J.Ch. 225; 171 L.T. 141; 8 Digest (Repl.) 395, 875.

(2) *Williams' Trustees v. Inland Revenue Comrs.*, [1947] 1 All E.R. 513; [1947] A.C. 447; [1948] L.J.R. 644; 176 L.T. 462; 27 Tax Cas. 409; 2nd Digest Supp.

(3) *Re Biss, Heasman v. Biss*, [1956] 1 All E.R. 89; [1956] Ch. 243; 23 Digest (Repl.) 542, 6060.

(4) *Re Strakosch, Temperley v. A.-G.*, [1949] 2 All E.R. 6; [1949] Ch. 529; [1949] L.J.R. 1477; 8 Digest (Repl.) 387, 807.

(5) *Re Hutchinson's Will Trusts, Gibbons v. Nottingham Area No. 1 Hospital Management Committee*, [1953] 1 All E.R. 996; [1953] Ch. 387; 8 Digest (Repl.) 415, 1079.

(6) *Re White's Will Trusts, Tindall v. United Sheffield Hospitals, Board of Governors*, [1951] 1 All E.R. 528; 8 Digest (Repl.) 325, 84.

(7) *Brownson v. Lawrance*, (1868), L.R. 6 Eq. 1; 37 L.J.Ch. 351; 18 L.T. 143; 23 Digest (Repl.) 500, 5660.

(8) *Gibbins v. Eyden*, (1869), L.R. 7 Eq. 371; 38 L.J.Ch. 377; 20 L.T. 516; 23 Digest (Repl.) 502, 5668.

- (9) *Sackville v. Smythe*, (1873), L.R. 17 Eq. 153; 43 L.J.Ch. 494; 23 Digest (Repl.) 501, 5661. A
- (10) *Re Smith, Hannington v. True, Giles v. True*, (1886), 33 Ch.D. 195; 55 L.J.Ch. 914; 55 L.T. 549; 23 Digest (Repl.) 501, 5662.

Appeal.

This was an appeal by the second defendant, the East Sussex County Council, and a cross-appeal by the first defendant, Frederick Arthur Moore, against an order of HARMAN, J., made on Dec. 5, 1957. On the application of the plaintiffs, the trustees of the will of the testator Henry Gibbins Cole, deceased, by originating summons dated July 16, 1957, HARMAN, J., declared, among other things, that the specific devise of the freehold properties St. Anton and Kinninghall to the East Sussex County Council contained in cl. 6 of the will of the testator failed. B

Denys B. Buckley for the second defendant, the East Sussex County Council.
C. J. Slade for the plaintiffs, the trustees. C

W. J. C. Tonge for the first defendant, interested in residue.

Cur. adv. vult.

July 17. The following judgments were read.

ROMER, L.J.: This is an appeal from an order of HARMAN, J., dated Dec. 5, 1957, whereby he made a declaration as to the manner in which certain charges created in favour of Westminster Bank, Ltd. by the testator during his lifetime should be borne and a further declaration that a specific devise contained in cl. 6 of the testator's will failed and the property fell into residue. The defendants, the East Sussex County Council, appeal against the second of these declarations, and a cross-notice of appeal has been served by the defendant Moore against the first declaration. The cross-notice only arises for decision if this court reverses the judge's declaration as to the invalidity of the specific devise, and I, accordingly, propose to deal with that question first. E

By his will dated Dec. 24, 1952, the testator appointed Westminster Bank, Ltd., the plaintiff, H. T. Philcox, and the defendant, F. A. Moore, to be the executors and trustees thereof; and after making certain bequests not material to the present appeal provided by cl. 6 of his will as follows: F

"I devise my freehold houses 'St. Anton' Meads Road Seaford aforesaid and 'Kinninghall' Meads Road Seaford aforesaid unto the East Sussex County Council Upon trust to apply the income arising therefrom or from any substituted investments of the proceeds of sale of the said dwelling-houses for the general benefit and general welfare of the children for the time being in Southdown House Firle Road Seaford aforesaid as a small token of my appreciation of the work carried on at such house. If however Southdown House shall be sold or cease to be utilised as a home for children then I direct that the East Sussex County Council shall apply the income from the said dwelling-houses or any substituted investments at the council's absolute discretion for the benefit of the children in other homes for children carried on under the auspices of the East Sussex County Council. I desire that the superintendent for the time being of Southdown House should be consulted with a view to ascertaining his views as to the allocation of the before mentioned income." G H

By cl. 7 of his will the testator gave his residuary estate on the usual trusts for sale and conversion and directed that after payment thereof of all his just debts funeral and testamentary expenses the same should be held on trust for the defendant F. A. Moore absolutely. The testator died on Apr. 5, 1955, and probate of his will was granted to the plaintiffs and the defendant Moore out of the District Probate Registry at Lewes on Sept. 28, 1955. On July 16, 1957, the plaintiffs issued an originating summons asking for directions as to the charges I

A created by the testator as hereinbefore mentioned and also asking whether the specific devise contained in cl. 6 of the will was a valid charitable devise or whether it failed and fell into residue.

The first point which arises on this second question is whether the devise in cl. 6 "for the general benefit and general welfare of the children for the time being in Southdown House" was intended to enure for the benefit only of the children B who were in the home when the testator died or for the benefit of future inmates from time to time as well. It is perfectly clear to me that the latter is the true view. The words "for the time being" sufficiently show this in themselves, but when one adds the consideration that the testator was directing the application of income and not of capital, and the fact that the home was only intended to provide temporary accommodation for the children received in it, no room, in C my judgment, is left for doubt.

On this view of the matter, then, the devise fails unless it was for a charitable purpose. The purposes for which Southdown House is carried on are stated in the affidavit of Mr. H. S. Martin, who is the clerk of the East Sussex County Council. In his affidavit he says:

D "Southdown House . . . is a home provided and maintained by the council pursuant to the Children Act, 1948, s. 15, for the accommodation of children in their care. Such children are either children received into the care of the council under s. 1 of the said Act or children committed to their care under the Children and Young Persons Act, 1933, s. 57, s. 62, s. 63, s. 64 (as E amended), s. 66 and s. 67*, to which sections of the said Acts I respectfully ask leave to refer. The said home provides accommodation for up to thirty children of either sex between the ages of five and fifteen. The said home is used as a short-stay and intermediate home, that is to say, as a home for children requiring to be cared for for periods ranging from a few weeks to two years or thereabouts, and is not intended to serve as a permanent home for young children who are likely to remain in the council's care until they F reach the age limit under the Children Act, 1948, of eighteen years or are otherwise likely to be in the council's care for long periods.

"The staff of the said home consists of a married couple who are in charge of the said home and two female assistants, who all reside in the said home, together with non-resident domestic staff. The children in the said home attend the usual local schools. No more education is provided G in the said home than would be provided by parents in a normal domestic home, to which it is the object of the council to make the said home approximate as nearly as possible.

"The cost of providing and maintaining the said home is provided partly from grants out of moneys provided by Parliament, partly from the general rate fund of the Administrative County of East Sussex and partly from H contributions received from parents under the Children Act, 1948, s. 23 and s. 24, and the Children and Young Persons Act, 1933, s. 86, as amended."

I In order to ascertain the classes or categories of children whom the council have to receive into the home reference must be made to the Children Act, 1948, and the Children and Young Persons Act, 1933. By s. 1 of the former Act local authorities have to receive children under seventeen (though the age limit in Southdown House is fifteen) who have no parent or guardian or whose parents or guardian have abandoned them; those whose parents or guardians are for various reasons prevented from providing for their proper accommodation, maintenance and upbringing; and in either case if it appears to the local

* Section 62 of the Act of 1933 has been amended by the Children and Young Persons (Amendment) Act, 1952, and the Magistrates' Courts Act, 1952, and s. 66 (3) of the Act of 1933 has been repealed by the Criminal Justice Act, 1948.

authority that its intervention is necessary in the interests of the welfare of the child. Section 11 provides that Part 2 of the Act relates to the powers and duties of local authorities in relation to children received by them into their care under s. 1 of the Act and (among others) children who by an order of any court under the Act of 1933 have been committed to their care as a fit person. By s. 15 local authorities have to provide homes as therein mentioned. Under s. 57 of the Act of 1933 any court by or before which a child or young person is found guilty of an offence punishable in the case of an adult with imprisonment shall have power to commit him to the care of "a fit person" (which, by s. 76, includes a local authority). By s. 62 juvenile courts may commit a child or young person in need of care and protection to the care of "a fit person". The expression "in need of care and protection" in relation to children is defined by s. 61 of the Act and includes (among others) those who are exposed to moral danger or are beyond the control of their parents and those against whom certain offences have been committed (see also s. 63 and s. 64). I think that the sections to which I have referred sufficiently indicate the kind of children who can and must be received into such homes as Southdown House; and, in relation to such children, the local authority (by virtue of s. 75 (4)) is to have the same rights and powers and be subject to the same liabilities in respect of their maintenance as if it were their parent.

Counsel for the county council contended before us, as he had contended before the learned judge, that the devise under cl. 6 of the will is within the spirit and intendment of the preamble to the Charitable Uses Act, 1601. The learned judge rejected the contention. According to the note we have of HARMAN, J.'s judgment, the learned judge said that the children referred to in the relevant statutory provisions were not "impotent" nor "orphans", that the reference in the preamble to the "payment of fifteens" had no application and that Southdown House was not a "house of correction". Counsel for the county council submitted to us that the gift should be upheld on the ground that the children in question are either orphans or in a position similar to that of orphans in that, having regard to their particular circumstances, they need care and attention which they cannot provide for themselves, but which are provided for them by the home. Their position, he said, is analogous to that of old people, and he submitted further that it would involve no misuse of language to describe them as "impotent". For these reasons he submitted that they came within the sense of the statute. Now it may be (I say no more) that a gift for the endowment or maintenance of such a home as Southdown House would qualify as a valid charitable trust. That, however, is not the gift with which we are concerned. The devise in question is not to or for the benefit of Southdown House, but "for the general benefit and general welfare" of the children for the time being in it; and it appears to me that some at least of the argument before us was addressed to an issue which does not arise.

It is, of course, clear beyond controversy that if property is vested in trustees on trust to apply the income for purposes some of which are charitable and some of which are not, and the trust involves a perpetuity, then the whole gift fails; and none the less because the trustees do in fact apply the income to the specified charitable objects to the exclusion of those which are not charitable. A recent example of this rule is to be found in the well-known case of *Chichester Diocesan Fund & Board of Finance (Incorporated) v. Simpson* (1) ([1944] 2 All E.R. 60). The question, then, as it seems to me, is whether the East Sussex County Council can, within the terms of their trust under cl. 6 of the testator's will, apply the income of the devised properties to purposes which are not charitable or whether the trust confines them to a charitable application of the income. In my judgment it is reasonably clear that the income could be applied "for the general benefit and general welfare of the children" in many ways that could not on any legitimate construction of the Statute of Elizabeth I be regarded as charitable. I

- A will take only one illustration. It is permissible to suppose that at any given time all or a considerable proportion of the children in the home may consist of juvenile delinquents, children who are beyond their parents' control and children who have been exposed to moral danger. It would appear to me that the provision of a television set, or a gramophone and records and the like, might well be regarded as being for the general benefit (which I take to mean benefit in a general way) of such children, and that some of the income could be applied to the provision of such amenities without any breach of trust being committed by the council. It is quite true that the illustrations or examples which are given in the preamble to the Act of 1601 are not exhaustive and a gift will be valid if it comes within the spirit and intendment of the statute (*Williams' Trustees v. Inland Revenue Comrs.* (2), [1947] 1 All E.R. 513). Nevertheless I cannot regard the provision of television sets, etc., for the benefit of such persons as juvenile delinquents and refractory children in Southdown House as coming within any conception of charity which is to be found in the preamble. If it were, then I suppose a gift to provide the inmates of a Borstal Institution with amenities would be charitable, which would appear to me to be an impossible contention.

- Counsel for the county council sought to avoid this conclusion by pointing to the reason of the devise as expressed by the testator, viz., "as a small token of my appreciation of the work carried on at such house". This language does not, however, confine the applications of the income to the carrying on of the work nor narrow the manner in which the council can properly deal with the income. Counsel also relied on the testator's desire, stated at the end of cl. 6, "that the superintendent for the time being of Southdown House should be consulted with a view to ascertaining his views as to the allocation of the before mentioned income". Counsel suggested that the superintendent would only approve expenditure which was calculated to promote the physical well-being or moral welfare of the children and that such expenditure would be for a charitable purpose. Without expressing any view whether it would or not, I do not think that counsel's point sufficiently meets the difficulty; for apart from the fact that the council would not necessarily be bound by the superintendent's views I see no reason why he should not recommend or approve of an expenditure on mere amenities if they were calculated to amuse and interest the children under his charge.

- Accordingly, though for reasons which are somewhat different from those on which the learned judge founded his decision, I am of opinion that the devise in cl. 6 of the will is invalid. On this view of the case it becomes unnecessary to consider or decide the point raised by the defendant F. A. Moore as residuary legatee on his cross-appeal. That question arises from the fact that by a memorandum of deposit dated Nov. 24, 1952, the testator charged the two properties comprised in cl. 6 of his will with the debt due by him to the Westminster Bank, Ltd. By a memorandum of deposit dated Nov. 25, 1952, the testator charged another freehold dwelling-house known as Wytham Place, Seaford, with the same debt. At his death the testator was indebted to the bank in the sum of about £2,094, which was charged on these three properties. The two specifically devised properties are still retained by the executors, and one of them was valued for probate purposes at £1,250 and the other at £1,100. Wytham Place, which formed part of the residuary estate, was sold by the executors for £6,000, and a question arose as to how the charge on the three properties should be borne. HARMAN, J., following a previous decision of his own in *Re Biss, Heasman v. Biss* (3) ([1956] 1 All E.R. 89), made a declaration that the whole of the sum charged on the properties ought to be paid wholly out of the proceeds of sale of Wytham

Place*. By his cross-notice of appeal the defendant Moore asks that in the event of the main appeal succeeding a declaration should be made that the whole of the sum secured ought to be charged rateably on the three freehold properties in proportion to their respective values. As in my judgment the council's appeal does not succeed this point does not arise. I desire, however, to keep open, until it arises as an issue in some future case, the question whether the decision of the learned judge in *Re Biss* (3) and his corresponding decision in the present case were correct. I would dismiss the appeal. A
B

ORMEROD, L.J.: I agree with **ROMER, L.J.**, that this appeal should be dismissed, and largely for the same reasons.

Counsel for the county council argued the case before the learned judge, and indeed before this court, on the basis that the gift in question was really a gift for the endowment of Southdown House, and that such a gift would be within the spirit and intendment of the preamble to the Charitable Uses Act, 1601, and therefore valid as a charitable trust. It appears from the note which is available of the learned judge's judgment that he rejected this contention on the ground that the children who, by reason of the various relevant statutory provisions, might be committed to the care of the home did not of necessity come within any of the classes referred to in the preamble, and that Southdown House was not a home of correction, and he came to the conclusion that the devise was not a charitable gift, as it tended to a perpetuity, and was therefore bad. C
D

The question emerged before this court in the course of the argument whether, on a proper construction of cl. 6 of the will, the gift should be treated as one for the endowment or maintenance of Southdown House or as one for the benefit of the children for the time being committed to the care of those in charge of the home. The gift is one of income to be applied "for the general benefit and general welfare of the children for the time being in Southdown House". The fact that it is a gift of income and not capital and is to be applied for the benefit and welfare of the children "for the time being" in the house, in my judgment, points strongly to the view that the gift was not intended to be for the endowment or maintenance of the home. It appears to be a fund intended to provide additional amenities for the children from time to time in the home which would not, or might not, in the ordinary way be provided for them by the local authority in the performance of their duties under the relevant statutory provisions. If this be the proper construction to put on cl. 6 of the will, it is unnecessary to decide whether a gift for the endowment or maintenance of Southdown House would be within the "spirit and intendment" of the Charitable Uses Act, 1601, and I express no view on it. E
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The question which remains is whether the gift, on the construction of the clause which I believe to be the right one, can be regarded as charitable. In my view it cannot be so regarded. There appear to be many ways in which the money in question can be applied which would be for the welfare and benefit of the children, and, therefore, within the terms of the gift, but which would not be charitable gifts in the legal sense. In these circumstances, in my judgment, the gift is invalid; and I would dismiss the appeal. H

LORD EVERSHED, M.R.: I have the misfortune to have arrived (I need not say, with very great diffidence) at a conclusion different from that which has commended itself to my brethren and to **HARMAN, J.** I agree with I

* **HARMAN, J.**'s decision was to the effect that the testator intended that the two specifically devised properties should go to the county council uncharged in any way. He had decided in *Re Biss* (3) that since part of the mortgaged property was specifically devised and some fell into residue that showed an intention to exclude the operation of s. 35 of the Administration of Estates Act, 1925. *Re Biss* (3) was, he held, exactly applicable, and the direction which the testator had made regarding estate duty (viz., that estate duty on the two specifically devised properties should be paid out of residue) made no difference.

- A them in rejecting counsel for the county council's alternative suggestion that the gift was an absolute gift to those children whose chance it was to be at Southdown House at the moment of the testator's death. Counsel will, I hope, forgive me if I say no more on an argument which (having regard to the language used by the testator) has seemed to me wholly untenable. But I have in the end formed the view that the gift of the income of "St. Anton" and "Kinninghall"
- B "for the general benefit and general welfare of the children for the time being in Southdown House" ought to be regarded as a good charitable gift.

- The conditions to be satisfied by a gift claiming to qualify as charitable are easy enough to state. The purposes of the donor must have the necessary public quality: and they must have the charitable character derived from the "spirit and intendment" of the preamble to the statute 43 Eliz. 1 c. 4. No
- C question arises in the present case as to the public quality of the relevant disposition. But can its purposes be discerned to fall within the spirit and intendment of the preamble? The problem, as I have said, is easy to state. The difficulty is, as it has so often been found to be in the numerous cases that have come before the courts, in the solution. It is not now in doubt that the scope or idea of "charity" which the examples in the preamble illustrate, is not limited
- D to those examples or to other dispositions merely analogous to them (see *Re Strakosch, Temperley v. A.-G.* (4), [1949] 2 All E.R. 6). "Spirit and intendment" comprehend, as I understand it, all dispositions in which is discerned the essential "charitable" characteristic possessed in common by all the preamble's examples. Notwithstanding the passage of three centuries, during which the courts have been able to attach the charitable label to large numbers and
- E varieties of dispositions (and to reject the claim to qualify in no less a number of cases), the underlying idea seems to remain, at times, as elusive as ever. The truth may be that the possible variations of expressed intention by testators and settlors are as the sands of the sea, and that no catalogue of illustrations, however long, can exhaust or confine charity's scope. Moreover, the spirit and intendment of the preamble, as of any collocation of words, may fairly be under-
- F stood differently by different minds. So in this instance it has seemed to me, with due respect to the opposite conclusions of my brethren and HARMAN, J., that the spirit and intendment of the Elizabethan statute is such as to cover the present case.

- I agree with HARMAN, J., that no useful clue can in the present case be derived from the word "impotent" in the trilogy, "aged, impotent and poor". HAR-
- G MAN, J., however, according to the note of his judgment, thought equally irrelevant the reference to preferment of orphans, since the children in the present case were not, or were not necessarily, orphans, and because by the word "preferment" was meant apprenticeship. But, in my judgment, this view involves a restriction of the class of charitable purposes to those that are, at best, strictly
- H analogous to the illustrations stated in the preamble; and I do not understand the scope of charity to be so confined. In my judgment, the inference was to be drawn from references such as those to the education and preferment of orphans, to schools of learning and free schools, and (perhaps also) to the marriage of poor maids; and the general emphasis in favour of gifts to and for persons suffering from disability and incapacity of various kinds is that the care and upbringing of children who, for any reason have not the advantage or opportunity of being looked after and brought up by responsible and competent persons
- I or who could, for these or other reasons, properly be regarded as defenceless or "deprived", are matters which *prima facie* qualify as charitable purposes. It was not doubted during the argument that gifts directed to the prevention of cruelty to children would be charitable: and the charitable qualification of such gifts depends, as I think, on the considerations which I have just stated rather than on the ethical or improving notion of such an activity as it would be in the case, for example, of a gift for the prevention of cruelty to animals. Thus,

it would appear to me that a trust established during the last century (that is, before Parliament had imposed any duty of care for children on local authorities) for the purposes of the protection or upbringing of children in the parish or town of X, who, owing to the death, incapacity or unfitness of their parents or otherwise, could not be properly protected or brought up, would have been held charitable. If I am right so far, then the charitable nature of such purposes is not displaced merely by the circumstance that their execution is made by the Act of Parliament a duty of local authorities any more than the care of the sick and maimed has ceased to be a charitable purpose by reason of the so-called nationalisation of hospitals (see, e.g., *Re Hutchinson's Will Trusts*, *Gibbons v. Nottingham Area No. 1 Hospital Management Committee* (5) ([1953] 1 All E.R. 996) and cases there cited).

That, however, is not the end of the matter. The gift here is expressed to be "for the general benefit and general welfare of the children . . . in Southdown House", and it is coupled with an expression of desire that the superintendent of Southdown House should be consulted "with a view to ascertaining his views as to the allocation of the before mentioned income". The form of gift raises, therefore, two further questions, viz.: (i) What exactly are the purposes for which, and the manner in which, the institution known as Southdown House is carried on; and (ii) Even if the answer to the first question is such that the furtherance of the purposes and activities of Southdown House is *prima facie* charitable, does the phrase "for the general benefit and general welfare of the children" cover application of income of the fund which would extend beyond the statutory duties of the local authority in conducting the home, or which, for this or other reasons, would themselves be non-charitable?

The authority for the East Sussex County Council's activities as regards Southdown House is derived from the Children Act, 1948, s. 15, which, by sub-s. (1) empowers a local authority to "provide, equip and maintain . . . homes for the accommodation of children in their care". Sub-section (4) empowers the Home Secretary to make regulations as to the conduct of such homes; and although no such regulations were referred to before us*, it is to be noted that the regulations contemplated are directed to "securing the welfare" of the children in the homes with particular regard to such matters as accommodation, equipment and religious upbringing. Section 15 of the Act of 1948 is in Part 2 of the Act, which (by s. 11) is expressed to relate to the powers and duties of local authorities in relation to children received by them into their care under s. 1 of the Act of 1948, and children who, by an order of any court under the Children and Young Persons Act, 1933, have been committed to the care of the local authority "as a fit person".

Section 1 of the Act of 1948 imposes a duty on local authorities to receive into their care children of the classes mentioned in the section, and (by sub-s. (2)) to keep them in their care so long as the children's "welfare" appears so to require. The classes of children referred to are those of children (appearing to be not more than seventeen) who have no parents or guardians or have been abandoned, and those whose parents or guardians are prevented by incapacity or other circumstances from "providing for [their] proper accommodation, maintenance and upbringing". Finally, as regards the Act of 1948, s. 12 requires a local authority to exercise their powers with respect to any child in their care

"so as to further his best interests, and to afford him opportunity for the proper development of his character and abilities."

The Children and Young Persons Act, 1933, is expressed as a consolidating Act concerned with persons under eighteen, and is (putting the matter generally)

* The Administration of Children's Homes Regulations, 1951 (S.I. 1951 No. 1217) have been made under the sub-section.

A designed to protect such young persons against cruelty and exposure to moral and physical danger, and also in relation to criminal and summary proceedings. The inclusion of local authorities in the category of "fit persons" is provided by s. 76, which imposes accordingly on local authorities the duty of undertaking the care of children. Thus, s. 35 (1) (b) requires the appropriate local authority to be notified when a child is brought before any court on an alleged offence
B or as being "in need of care or protection"; and by s. 44 every court dealing with a child is to have regard to its "welfare" and in all proper cases to

"take steps for removing him from undesirable surroundings, and for securing that proper provision is made for his education and training."

C There follow provisions for the establishment of juvenile courts, and by s. 57 power is conferred on courts in the case of a child found guilty of an offence "punishable in the case of an adult by imprisonment . . . to commit him to the care of a fit person". Section 61 defines the meaning of the phrase "child in need of care and protection"; that is to say (briefly) (i) a child who, having no parent or guardian or whose parent or guardian is unfit, is falling into bad associations, exposed to moral danger, or beyond control; and (ii) a child against whom
D incest or other like offences have been or may be committed. Section 62 empowers a juvenile court to commit a child in need of care and protection to the care of a "fit person"; and by s. 64 a parent or guardian of an uncontrollable child is empowered to bring such child before a juvenile court for an order for the child's commitment to the care of a fit person. Finally, by s. 75 (4) a fit person to whom a child has been committed has, in regard to that child, while the order is in
E force, the powers and duties of a parent. It is, however, made clear in this Act, as it is also made clear in the Act of 1948, that these powers and duties of a local authority are without prejudice to the obligation of a parent or guardian to contribute to the child's maintenance.

My summary of the complicated provisions of the two relevant Acts is necessarily incomplete, but, I hope, not inadequate. It appears from the references
F which I have made that the home with which we are concerned is maintained by the East Sussex County Council for the care and upbringing of one or more of three possible classes of children which may be briefly defined thus: (i) children without parents or guardians, or with parents or guardians incapable for any reason of properly looking after them or bringing them up—what were called in the argument "deprived" children: (ii) children whose circumstances and
G surroundings expose them to moral or physical danger or contamination: and (iii) children who, for whatever reason, are out of control or uncontrollable, or have committed offences of a kind punishable in the case of an adult by imprisonment—what may for convenience be called, in modern terminology, "delinquent" children. For reasons which I have already attempted to state, a gift
H for the purpose of providing for the care and upbringing, in other words a home for the class of "deprived" children, within the area of the local authority is, in my view, a gift constituted for charitable purposes. In my judgment, a similar gift for the benefit of children of the second class above named within the area, whether alone or in conjunction with "deprived" children, would, for like reasons, also be within the spirit and intendment of the preamble. But what of the third class, the class of delinquents? I agree with HARMAN, J., that a home
I established for the care of such children cannot properly be described as a "house of correction", as that phrase is used in the statute of the first Queen Elizabeth. Nevertheless, if I am right in thinking that the care and protection of children of the first two classes above mentioned is *prima facie* within the spirit and intendment of the preamble, the reference to houses of correction seems to me to support the view that the charitable nature of the purpose of looking after children is not negated by the circumstance that some (or even all) of the children who require care and protection are children who have fallen into evil associations

and evil habits. After all, the notion underlying the relevant provisions of the Acts of 1933 and 1948 is surely that children of the delinquent class have fallen into their bad habits and associations through lack of care and protection which a home of the kind contemplated by the Acts can provide: and because, in the absence of such care and protection, they, as children, are defenceless against the temptations to which they are exposed. I should add that I do not think that the result is affected by the circumstance that the parents or guardians of the children are liable to contribute to their maintenance. There is no evidence before us of the extent to which in practice such contributions are obtained, but in the nature of things, and in the light of the general scope and background of the legislation, it could not, in my view, have been or be contemplated that such contributions would play in truth other than an entirely incidental or ancillary part in the general conduct of the homes.

It was not suggested in argument that because the effect of the disposition of this testator would be some relief of rates the result was materially affected. It follows, therefore, in my judgment, that if the purpose of the gift in the present case had been expressed to be towards the maintenance and equipment of the Southdown Home in accordance with the obligation of the legislation, it would have qualified as a good charitable gift. But there remains the second question posed above—is the result altered by the use of the words “for the general benefit and general welfare” of the children in the home? It is on this form of words, as I believe, that my brethren have particularly relied as being inconsistent with a valid charitable gift. As ROMER, L.J., has put it in his judgment (which I have had the advantage of reading in advance) the effect of the words is to justify the use of the income of the property devised for the provision of mere amenities, such as a television set or a gramophone for children of what I have called the delinquent class.

In my judgment, the question is really one of the construction of the words which I have quoted. The testator must, I think, be taken to have known the statutory purpose of Southdown House and the statutory powers and duties in regard to it of the East Sussex County Council. Indeed, he refers in terms to the nature of the work at the home and to his desire that his gift should be taken as a mark of his appreciation of that work. Construed in that context, the words “general benefit and general welfare” ought not, in my judgment, to be treated as meaning anything more than “generally for the benefit and welfare of the children in accordance with the local authority’s obligations under the statutes”. I must not be taken to be saying that the result would be different though the effect were to be to enable the council to apply that gift in acquiring for the children amenities which they might not otherwise be able to enjoy. It has been held (and, in my view, rightly) that a trust for providing amenities in publicly owned hospitals, if otherwise tending to further the purposes of the hospitals or to promote their efficiency, constitutes a good charitable gift (see, for example, *Re White’s Will Trusts*, *Tindall v. United Sheffield Hospitals, Board of Governors* (6), [1951] 1 All E.R. 528); and I see no reason why a parity of reasoning should not be applied to the case of the children in Southdown House. But I have, in my citations from the relevant legislation, emphasised the use, more than once, of the word “welfare”. I refer again to the language of s. 12 of the Act of 1948:

“ . . . so as to further his best interests, and to afford him opportunity for the proper development of his character and abilities.”

In my judgment, the words used by the testator do no more than briefly express the same thing. Funds provided generally for the care of the sick and maimed are necessarily used for their general welfare and benefit, and intended by their very application to be so used. So here, the purpose of the provision of maintenance and equipment of Southdown House is for the general benefit and

A general welfare of the resident children. Indeed, the use of the adjective "general" seems to me rather to postulate the application of the gift towards the welfare and benefit of the children taken as a whole, than to contemplate its use for providing for particular children special advantages or means of enjoyment beyond the scope of the general intention of the Act in establishing these homes.

B If, therefore, matters rested with me, I would allow the appeal. In the result it would be necessary to consider the question raised by the cross-appeal, which is of the following nature. At the date of the testator's death the property, the subject of the devise with which I have so far dealt, was, together with another house belonging to the testator and known as Wytham Place, the subject of charges in favour of the testator's bankers, Westminster Bank, Ltd.

C Wytham Place was not the subject of any specific devise contained in the testator's will, and formed accordingly part of the testator's residue given in favour of the first defendant. If the specific devise of "St. Anton" and "Kinninghall" can take effect as a good charitable gift, the question then arises whether these properties must bear a due proportion of the amount owing to the Westminster Bank at the testator's death; or whether they are

D entitled to throw the whole amount of the debt on Wytham Place (or its proceeds of sale) which, as I have said, was the subject of the testator's residuary disposition. On the view which HARMAN, J., took on the first question, this second matter did not in strictness arise: but as it had been fully argued before him, the learned judge expressed his opinion against the claim of the residuary legatee. My brethren have, on the first question, reached the same conclusion

E as HARMAN, J., and, since the second question does not therefore require a decision from this court, they have preferred to express no view on it. In the circumstances, I, too, prefer to express no conclusion on it, but in case this matter should go further, I have thought that I might usefully add some observations, though I do so briefly, on the point raised by the cross-appeal.

F The question depends on the effect of the Administration of Estates Act, 1925, s. 35, when applied to the facts of the present case. That section, so far as relevant, provides:

"(1) Where a person dies possessed of, or entitled to . . . an interest in property, which at the time of his death is charged with the payment of money . . . and the deceased has not by will deed or other document signified a contrary or other intention, the interest so charged, shall as between the different persons claiming through the deceased, be primarily liable for the payment of the charge; and every part of the said interest, according to its value, shall bear a proportionate part of the charge on the whole thereof.

H —(2) Such contrary or other intention shall not be deemed to be signified —(a) by a general direction for the payment of debts or of all the debts of the testator out of his personal estate, or his residuary real and personal estate, or his residuary real estate; or (b) by a charge of debts upon any such estate; unless such intention is further signified by words expressly or by necessary implication referring to all or some part of the charge."

I The argument of counsel for the county council was to the effect that since, for the purpose of paying unsecured debts, residuary realty was chargeable in priority to realty specifically devised, and could therefore be sensibly regarded (from the point of view of the liabilities to which the estate was subject) as ranking lower than specifically devised realty, the specific devise of "St. Anton" and "Kinninghall" ought to be regarded as expressing "a contrary or other intention" within the meaning of the Administration of Estates Act, 1925, s. 35 (1). HARMAN, J., said that this view appealed to him in any case and in the absence of authority: but the learned judge found support for his view

in the decision of LORD ROMILLY, M.R., in *Brownson v. Lawrance* (7) ((1868), L.R. 6 Eq. 1) which he (HARMAN, J.) himself had followed in *Re Biss* (3). *Brownson v. Lawrance* (7) was a decision under Locke King's Act, properly called the Real Estate Charges Act, 1854. LORD ROMILLY, M.R., had based his view on the premise that real estate, the subject of a residuary devise, could not be regarded as specifically devised. It is now conceded (as was pointed out, for instance, by MALINS, V.-C., in *Gibbins v. Eyden* (8) ((1869), L.R. 7 Eq. 371) that the premise was, as the law then stood, not well-founded. For this reason it is also conceded that *Brownson v. Lawrance* (7) must be regarded as not having been correctly decided. But it was said that since the validity of LORD ROMILLY's premise must, under the Administration of Estates Act, 1925, be now taken as restored, the authority of *Brownson v. Lawrance* (7) ought to be regarded as re-established.

This, however, is not the end of the tale of authority. In *Sackville v. Smythe* (9) ((1873), L.R. 17 Eq. 153) the same point came before LORD ROMILLY's successor, SIR GEORGE JESSEL, M.R. The facts were that a testator devised part of his estate, to which he was entitled subject to a mortgage, for the benefit of his widow for life and the remainder to his residuary devisee. He bequeathed his personal estate subject to debts, and directed that the deficiency should be charged on his residuary real estate. SIR GEORGE JESSEL's short judgment was as follows (*ibid.*, at p. 155):

"I can find in this will no contrary or other intention within the meaning of the exception in Locke King's Act. It has been enacted that a general direction for payment of debts out of personal estate shall not be deemed to exonerate mortgaged properties, and what is there in this case to take it out of the general rule? If I were to decide otherwise, I should have to hold that every devise of a life interest in real estate was an expression of a contrary intention. It does not appear to me that Locke King's Act was intended to apply as between specific and residuary devises in the way it was held to apply in *Brownson v. Lawrance* (7)."

It will be seen that the view of SIR GEORGE JESSEL was directly contrary to that of LORD ROMILLY, apart altogether from the premise on which the latter had been based: for in SIR GEORGE JESSEL's view, a specific devise of realty could not of itself amount to an expression of contrary intention within the meaning of Locke King's Act. Thirteen years later these conflicting views were considered by NORTH, J., in *Re Smith, Hannington v. True, Giles v. True* (10) ((1886), 33 Ch.D. 195); and that learned judge preferred the view of SIR GEORGE JESSEL to that of LORD ROMILLY. No doubt seems to have been since cast on the opinion of NORTH, J., during the seventy years which elapsed before *Re Biss* (3) came before HARMAN, J. It does not appear, however, that the cases of *Sackville v. Smythe* (9) and *Re Smith* (10) were cited to HARMAN, J., either in *Re Biss* (3) or in the present case. Had they been so cited, it is possible that HARMAN, J., would have decided the two cases before him otherwise than as he did. As I have earlier said, I prefer in the circumstances—including the circumstance that *Re Biss* (3) has not been the subject of any appeal—to leave the matter open for further consideration (in the light of all the cases to which I have referred) if and when the point again arises.

Appeal dismissed. Leave to appeal to the House of Lords granted.

Solicitors: *Sharpe, Pritchard & Co.*, agents for Clerk to East Sussex County Council (for the second defendant); *Haslewoods*, agents for *Philcox & Son*, Seaford (for the other parties).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

A CARAPANAYOTI & CO., LTD. v. E. T. GREEN, LTD.

[QUEEN'S BENCH DIVISION (McNair, J.), July 3, 4, 18, 1958.]

Sale of Goods—C.i.f. contract—Obligation of sellers to ship by customary route—Frustration—Closing of Suez Canal.

By contract dated Sept. 6, 1956, goods were sold for shipment from Port Sudan during October or November, 1956, at sellers' option, cost, freight and insurance to Belfast. At the date of the contract the usual and customary route for such shipments was through the Suez Canal, which had been nationalised on July 26, 1956. On Oct. 29, 1956, the armed forces of Israel invaded Egypt; on Nov. 1, Britain and France began military operations in Egypt and on Nov. 2 the Suez Canal was closed to navigation and not re-opened until Apr. 9, 1957. While the canal was closed the only route to Belfast was via the Cape. The sellers did not ship the goods and it was not possible for them to have purchased the goods afloat c.i.f. Belfast. The buyers claimed damages for breach of contract.

Held: (i) under c.i.f. contract containing no stipulation to the contrary the contractual obligation of the sellers in relation to the route by which the goods were to be shipped was to ship them by a route that was usual and customary at the time of performance of the contract, viz., in this case, a date before the end of November, 1956.

(ii) the continued availability of the route through the Suez Canal was a fundamental assumption at the time when the contract was made, and accordingly performance was frustrated by the closing of the canal and both parties were discharged from the contract.

[As to shipment of goods under a c.i.f. contract, see 29 HALSBURY'S LAWS (2nd Edn.) 214, 215, para. 286.

As to the frustration of a contract, see 8 HALSBURY'S LAWS (3rd Edn.) 185, 186, para. 320; and for cases on the subject, see 12 DIGEST (Repl.) 459, 460, 3425-3429.]

Cases referred to:

- (1) *Re Sutro (L.) & Co. & Heilbut, Symons & Co.*, [1917] 2 K.B. 348; 86 L.J.K.B. 1226; 116 L.T. 545; 17 Digest (Repl.) 45, 543.
- (2) *Reardon Smith Lines, Ltd. v. Black Sea & Baltic General Insurance Co., Ltd., The Indian City*, [1939] 3 All E.R. 444; [1939] A.C. 562; 108 L.J.K.B. 692; 161 L.T. 79; Digest Supp.
- (3) *Posilethwaite v. Freeland*, (1880), 5 App. Cas. 599; 49 L.J.Q.B. 630; 42 L.T. 845; 41 Digest 539, 3666.
- (4) *Duncan v. Köster, The Teutonia*, (1872), L.R. 4 P.C. 171; 8 Moo. P.C.C.N.S. 411; 41 L.J.Adm. 57; 26 L.T. 48; 17 E.R. 366; 41 Digest 484, 3165.
- (5) *Upjohn v. Hitchens, Upjohn v. Ford*, [1918] 1 K.B. 171; *affd.* C.A., [1918] 2 K.B. 48; 87 L.J.K.B. 1205; 119 L.T. 180; 31 Digest (Repl.) 401, 5304.
- (6) *Biddell Brothers v. E. Clemens Horst Co.*, [1911] 1 K.B. 214; *revsd.* C.A., [1911] 1 K.B. 934; 80 L.J.K.B. 584; 104 L.T. 577; *revsd. on other grounds*, sub nom., *E. Clemens Horst Co. v. Biddell Brothers*, [1912] A.C. 18; 17 Digest (Repl.) 42, 503.
- (7) *Re Badische Co., etc.*, [1921] 2 Ch. 331; 91 L.J.Ch. 133; 126 L.T. 466; 12 Digest (Repl.) 450, 3390.
- (8) *Ashmores & Son v. Cox (C. S.) & Co.*, [1899] 1 Q.B. 436; 68 L.J.Q.B. 72; 12 Digest (Repl.) 432, 3318.
- (9) *Blackburn Bobbin Co. v. Allen (T. W.) & Sons*, [1918] 2 K.B. 467; 87 L.J.K.B. 1085; 119 L.T. 215; 12 Digest (Repl.) 452, 3400.
- (10) *Joseph Constantine S.S. Line, Ltd. v. Imperial Smelting Corp., Ltd.*, [1941] 2 All E.R. 165; [1942] A.C. 154; 110 L.J.K.B. 433; 165 L.T. 27; 12 Digest (Repl.) 436, 3333.

- (11) *British Movietonews, Ltd. v. London & District Cinemas, Ltd.*, [1951] 2 All E.R. 617; [1952] A.C. 166; 3rd Digest Supp. A
- (12) *Davis Contractors, Ltd. v. Fareham U.D.C.*, [1956] 2 All E.R. 145; [1956] A.C. 696; 3rd Digest Supp.
- (13) *F. A. Tamplin S.S. Co., Ltd. v. Anglo-Mexican Petroleum Products Co., Ltd.*, [1916] 2 A.C. 397; 85 L.J.K.B. 1389; sub nom. *Re F. A. Tamplin S.S. Co., Ltd. & Anglo-Mexican Petroleum Products Co., Ltd.*, 115 L.T. 315; 12 Digest (Repl.) 442, 3361. B
- (14) *Sir Lindsay Parkinson & Co., Ltd. v. Works & Public Buildings Comrs.*, [1950] 1 All E.R. 208; [1949] 2 K.B. 632; 2nd Digest Supp.
- (15) *Southern Foundries (1926) Ltd. v. Shirlaw*, [1940] 2 All E.R. 445; [1940] A.C. 701; 109 L.J.K.B. 461; 164 L.T. 251; *affg.* sub nom. *Shirlaw v. Southern Foundries (1926) Ltd.*, [1939] 2 All E.R. 113; [1939] 2 K.B. 206; 9 Digest (Repl.) 557, 3689. C
- (16) *Larrinaga & Co. v. Société Franco-Américaine des Phosphates de Médulla*, (1923), 92 L.J.K.B. 455; 129 L.T. 65; 29 Com. Cas. 1; 41 Digest 304, 1665.

Special Case. D

This was an appeal from an award in the form of a Special Case stated by the Board of Appeal of the London Cattle Food Association. Sellers of goods under a c.i.f. contract for shipment from Port Sudan to Belfast during the months of October or November, 1956, did not ship them in consequence of the Suez Canal being closed to shipping on Nov. 2, 1956. The buyers claimed damages for breach of contract. The dispute was referred to arbitration and the umpire awarded on Feb. 20, 1957, that the sellers (*Carapanayoti & Co., Ltd.*) were in default and should pay to the buyers (*E. T. Green, Ltd.*) the difference between the contract price and the selling price. The sellers appealed to the Board of Appeal who at the request of the parties stated their award in the form of a Special Case, the question for the decision of the court being whether on the true construction of the contract and the facts found (a) the contract was frustrated or (b) performance was excluded by cl. 17 of the contract. The facts and the terms of cl. 17 appear in the judgment. E

Eustace Roskill, Q.C., and *R. A. MacCrindle* for the appellants (the sellers).
M. R. E. Kerr for the respondents (the buyers). F

Cur. adv. vult. G

July 18. **McNAIR, J.**, read the following judgment: The following facts are taken from the Special Case. By a contract dated Sept. 6, 1956, on the standard printed form headed: "Contract for Imported Feeding Cakes and Meals: c.i.f. terms" issued by the London Cattle Food Trade Association, Messrs. *Carapanayoti & Co. Ltd.*, of London (hereinafter referred to as the sellers) agreed to sell to *E. T. Green, Ltd.*, of Belfast (hereinafter referred to as the buyers) one hundred tons of Sudanese semi-decorticated cotton seed cake at £28 15s. per ton for shipment per steamer or steamers, direct or indirect, with or without transshipment, from Port Sudan during October/November, 1956, at sellers' option, cost, freight and insurance to Belfast. Clause 17 of this contract provided as follows: H

"In case of prohibition of export, blockade or hostilities or in case of any executive or legislative act done by or on behalf of the government of the country of origin or of the territory where the port or ports of shipment named herein is/are situate, preventing fulfilment, this contract or any unfulfilled portion thereof so prevented shall be cancelled. In the event of shipment proving impossible during the contract period, sellers shall advise buyers without delay with the reasons therefor. If required, sellers must produce proof to justify their claim for cancellation." I

- A** The Suez Canal was nationalised on July 26, 1956; but at the date of the contract, namely, Sept. 6, 1956, the usual and customary route for the shipment of goods from Port Sudan to Belfast was via Suez and the route via the Cape was not a usual or customary route for such shipments. Though after nationalisation it was known that shipments via the canal were uncertain and subject to delay, sellers and buyers of cotton seed cake from Port Sudan c.i.f. United Kingdom ports at the time when the contract in question was made would assume that the goods, as theretofore, would be shipped via the canal, and it was not then generally known that vessels passing through the canal ran risks of detention or confiscation.

- C** On Oct. 29, 1956, armed forces of Israel invaded Egypt; on Nov. 1 Great Britain and France began military operations in Egypt, and on Nov. 2, 1956, the Suez Canal became closed to navigation by reason of the physical blocking of the canal by the Egyptian authorities, such action being by concession rightly made before me an act of hostilities within the meaning of cl. 17. On Nov. 6 the cease-fire was declared in Egypt. After the closure of the Suez Canal to navigation on Nov. 2 freight via the canal became impossible and all shipments from the Sudan had to be made via the Cape until the canal was reopened to shipping on Apr. 9, 1957. During the months of October and November, 1956, no goods of the contract description were shipped from Port Sudan for Belfast on vessels which, in fact, proceeded on their voyage via the Suez Canal; but during November, 1956, fourteen vessels called on various dates at Port Sudan, loaded cargo and proceeded to their several destinations in the United Kingdom and elsewhere in Europe via the Cape. The distance from Port Sudan to Belfast
- E** via the Suez Canal is 4,068 miles and via the Cape 10,793 miles. Before the closing of the canal the normal freight rate for the voyage from Port Sudan to Belfast was £6 10s. per ton. On Nov. 9, 1956, a surcharge of twenty-five per cent. was imposed on freight as a result of the closing of the canal, which was increased on Dec. 12 to one hundred per cent. Though the sellers had covered themselves for their sale by a purchase on the same date from Sudan Oil Mills, Ltd.,
- F** Khartoum, and five hundred tons of goods complying with the contract were in warehouse at Khartoum at that date, no space was at any time booked by the sellers for the shipment of the one hundred tons, and they made no endeavour at any time to procure shipping space for their shipment. It was apparent very soon after the closing of the canal that the closing would last a considerable time—certainly until after the end of November. The sellers could not, after the
- G** closing of the canal on Nov. 2, have purchased afloat on c.i.f. Belfast terms one hundred tons of the contract goods shipped from Port Sudan to Belfast in October or November, 1956, via the Suez Canal.

- The question left for the decision of this court is whether, on the true construction of the contract and on the facts found (a) the contract was frustrated, or (b) performance was excused by cl. 17. Subject to the decision of the court
- H** on this question, the board of appeal, affirming the original umpire, found the sellers to be in default.

- It was common ground between the parties, and, indeed, is clear law: (1) That under this form of contract the seller performs his obligation by shipping or procuring the shipment of goods of the contractual description on a vessel bound for the contractual destination (subject to the right of transshipment where
- I** specified in the contract) and by tendering to the buyer the shipping documents; namely, an invoice for the amount due, a bill or bills of lading for the carriage of the goods and a policy of insurance covering the goods to their destination; and (2) that, where as here the time of shipment is specified as, for example, "October/November at sellers' option", the seller has until the last day of permitted shipment in which to perform his shipping obligations. The seller must also, subject to any express term in the contract, ship the goods in such condition that, when carried under normal conditions of carriage, they will, in the absence

of extraneous circumstances, arrive in sound condition. In this concise statement of the seller's obligations I have omitted the qualification that the seller can perform this obligation by procuring or buying on the market a bill or bills of lading issued to shippers other than himself, provided that the bill or bills of lading comply with the contract since, as stated above, it is found by the case that the sellers could not, after the closure of the canal, have purchased afloat on c.i.f. Belfast terms one hundred tons of the contract goods shipped from Port Sudan to Belfast in October or November, 1956, via the Suez Canal. A B

In these circumstances, the first way in which the sellers put their case was as follows: (1) a c.i.f. seller performs his contractual obligations (so far as is material on the facts found) only by shipping goods of the contractual description and by procuring and tendering a bill or bills of lading providing for carriage by a route which is *at the date of sale contract* a usual and customary route, or, if there is at that date only one usual and customary route, by that route; (2) the parties to the contract not having specified the route, the contract has to be construed as if the usual and customary route had been written out in full in the sale contract; (3) the usual and customary route at the date of the sale contract was via the Suez Canal, and the route via the Cape was not a usual and customary route; (4) there must, accordingly, be written into the contract after the words "from Port Sudan" the words "via Suez Canal"; (5) performance of the contractual obligation as to shipping so specified became impossible owing to the occurrence of a supervening event beyond the control of both parties, namely, the closing of the Suez Canal on Nov. 2, 1956, and, accordingly, both parties were discharged from the contract on the grounds of frustration. The validity of this argument, or this method of putting the case, depends on two main submissions: (1) that the nature and extent of the shipping obligation, in particular in relation to route, must be ascertained as at the date of the sale contract; and (2) that the route so ascertained must then be written into the contract. The buyers join issue on both these points. C D E

It is true that in *Re L. Sutro & Co. & Heilbut, Symons & Co.* (1) ([1917] 2 K.B. 348) there are passages in the judgments which support the sellers' argument on the former point. In that case the facts were shortly as follows. By a contract dated Mar. 27, 1916, on the printed form for c.i.f. sales issued by the Rubber Trade Association the sellers agreed to sell to the buyers twenty-five tons of rubber c.i.f. to be shipped from the East to New York. The sellers made a declaration of shipment from Singapore via Seattle on the Pacific coast of the U.S.A. to be forwarded thence by rail to New York. Buyers rejected the tenders and claimed arbitration. The arbitrators found that after the outbreak of war in August, 1914, great difficulty was experienced in obtaining space for shipment from the East and, in consequence of this difficulty, in about October, 1915, before the contract date, shipments from the East to the eastern states of the U.S.A., which had hitherto gone directly or indirectly the whole distance to New York by sea, began to be made by steamers to a port on the western seaboard of the U.S.A., whence they were transmitted by rail to destination, and at the date when the contract was entered into this route was well known to those engaged in the trade as one of the usual routes for rubber sold on contracts in the form of that then in issue. The arbitrators, subject to the opinion of the court, upheld the tender as a good tender. SWINFEN EADY, L.J., and BRAY, J., affirming LUSH, J., held that the tender was bad on the grounds that, on the construction of the particular contract there in question, a custom or usage permitting a substantial part of the transit to be by rail would be inconsistent with, and repugnant to, the express terms of the contract which provided, in effect, for transport by a sea-going vessel. SCRUTTON, L.J., dissented. It is, in my judgment, quite clear that, having regard to the fact that the alternative route by rail was in existence at the date of the contract, the point at present in issue was not present in the minds of the court. F G H I

A In principle, it seems to me that where a contract expressly, or by necessary implication, provides that performance, or a particular part of the performance, is to be carried out in a customary manner, the performance must be carried out in a manner which is customary at the time when the performance is called for. This is particularly so in the case of forward contracts like many c.i.f. contracts which call for performance at some future date, when one bears in
B mind that in mercantile matters custom and usage are subject to rapid change—(see the speech of LORD WRIGHT in *Reardon Smith Lines, Ltd. v. Black Sea & Baltic General Insurance Co., Ltd.* (2), [1939] 3 All E.R. 444 at p. 452). For example, in times of strained international relations the customary form of bills of lading may change by the universal acceptance of a particular form of war-risk protection. Can it be said that the seller is bound to tender the form of bill of
C lading which was customary at the date of the contract when, by the time when performance has arrived, that form has been supplanted by another customary form? I think not. In *Postlethwaite v. Freeland* (3) ((1880), 5 App. Cas. 599) it was held that the charterers' obligation under a charterparty to discharge with all dispatch according to the custom of the port must be judged in reference to all the circumstances existing at the time of discharge. Again, when a charter-
D party provides for the nomination of a safe port by the charterer, it is not sufficient that the port is safe when nominated; it must be safe when the vessel arrives. A fortiori it is not sufficient that it is safe at the date of the contract (see *Duncan v. Köster, The Teutonia* (4) (1872), L.R. 4 P.C. 171).

In my opinion, as a matter of principle, the sellers' obligation under a contract such as this is not confined to shipping by a route which was a usual and customary
E route at the date of the sale contract, but is to ship by a route usual and customary at the time of performance. I am fortified in this conclusion by the observations (admittedly obiter) of ROCHE, J., in *Upjohn v. Hitchens* (5) ([1918] 1 K.B. 171 at pp. 179, 180) following HAMILTON, J., in *Biddell Brothers v. E. Clemens Horst Co.* (6) ([1911] 1 K.B. 214 at p. 220), to the effect that on a sale of goods on c.i.f. terms the seller's obligation as to insurance is to insure on terms current
F in the trade at the time when he comes to insure, and I do not think that the fact that in the contract here in question express provision to that effect is made in cl. 16 in relation to insurance should deter me from applying the principle to the form of the bill of lading and the route.

If this is right, it is not necessary to express any concluded opinion on the second point, namely, whether the legal effect of a finding that the only usual
G and customary route at the date of the contract was via the Suez Canal is the same as if the words "via Suez Canal" were expressly written into the contract. It is sufficient to say that, in my opinion, there may well be cases in which the legal effect would be different.

I now turn to the alternative way in which the sellers put their case, namely, that it was an implied term of the contract of sale that at the time when, within
H the contract period, the sellers elected to ship the goods the Suez Canal should be available, or (putting the case slightly differently) that to enforce the sale contract in the changed circumstances after the closing of the Suez Canal would be to enforce a different contract because the obligation to procure shipment via the Cape would be a different obligation from procuring shipment via Suez, and that accordingly, on the closure of the Suez Canal, the contract was frustrated.
I In approaching this method of putting the case I should first deal with the broad submission advanced on behalf of the buyers that, in the case of a contract for the sale of unascertained goods, the doctrine of frustration can only operate in very exceptional circumstances. It was submitted that there was no reported decision in which the doctrine had been applied to such a contract, except where the frustration was based on subsequent illegality. This may be so, but I am not satisfied that it is so. The matter is fully discussed in LORD McNAIR'S LEGAL EFFECTS OF WAR (3rd Edn.), at p. 307 et seq. I refer in particular to the

judgment of RUSSELL, J., in *Re Badische Co., etc.* (7) ([1921] 2 Ch. 331) where the learned judge says (*ibid.*, at p. 382):

"... I can see no reason why, given the necessary circumstances to exist, the doctrine should not apply equally to the case of unascertained goods. It is, of course, obvious from the nature of the contract that the necessary circumstances can only very rarely arise in the case of unascertained goods."

Further, I venture to doubt whether *Ashmore & Son v. C. S. Cox & Co.* (8) ([1899] 1 Q.B. 436), though accepted as accurate by PICKFORD, L.J., in *Blackburn Bobbin Co. v. T. W. Allen & Sons* (9) ([1918] 2 K.B. 467 at p. 470), is consistent with modern authorities, unless it is explained on the footing that it was not, in fact, a case of supervening impossibility, the war having broken out before the date of the contract (see LEGAL EFFECTS OF WAR, *supra*, at p. 304). I therefore approach the problem from the point of view that the doctrine of frustration may be applied to a contract for the sale of unascertained goods, though it can only properly be applied to such a contract in exceptional circumstances.

Though, after the decision in the House of Lords in *Joseph Constantine S.S. Line, Ltd. v. Imperial Smelting Corp., Ltd.* (10) ([1941] 2 All E.R. 165) many believed that the theory of the implied term had been authoritatively accepted as the basis of the doctrine of frustration, the embers of this old controversy glowed again in the decisions of the House in *British Movietonews, Ltd. v. London & District Cinemas, Ltd.* (11) ([1951] 2 All E.R. 617) and in *Davis Contractors, Ltd. v. Fareham U.D.C.* (12) ([1956] 2 All E.R. 145); and I feel that it would be presumptuous for me to attempt to choose between the different tests suggested and unnecessary because, on my appreciation of the facts, the same result would follow whichever of the classic tests is accepted.

On the basis of the speeches in the last case cited, counsel for the buyers, in my judgment rightly posed the following three questions, which he submitted should each receive a negative answer: (1) Must the parties have made their bargain on the basis that, if the canal was no longer available when the sellers elected to perform, the contract would be off? (See per LORD RADCLIFFE in *Davis Contractors, Ltd. v. Fareham U.D.C.* (12), [1956] 2 All E.R. at p. 159, adopting the language of EARL LOREBURN in *F. A. Tamplin S.S. Co., Ltd. v. Anglo-Mexican Petroleum Products Co., Ltd.* (13), [1916] 2 A.C. 397 at p. 403.) (2) Was the closure of the Suez Canal a circumstance fundamental enough to transmute the sellers' obligation into an obligation of a different kind, which the contract did not contemplate, and to which it could not apply? (See per LORD REID in *Davis Contractors, Ltd. v. Fareham U.D.C.* (12), [1956] 2 All E.R. at p. 155, adopting the language of ASQUITH, L.J. in *Sir Lindsay Parkinson & Co., Ltd. v. Works & Public Buildings Comrs.* (14), [1950] 1 All E.R. 208 at p. 229.) (3) Would the answer to the "officious bystander" have been: "Of course, if the canal is closed after Nov. 2, the contract is off"? (See MACKINNON, L.J., in *Shirlaw v. Southern Foundries (1926), Ltd.* (15), [1939] 2 All E.R. 113 at p. 124, and LORD RADCLIFFE in *Davis Contractors, Ltd. v. Fareham U.D.C.* (12), [1956] 2 All E.R. at p. 160.)

It is the function of the court to determine, as a matter of law, whether frustration arises on the courts' appreciation of the facts found and of the legitimate inference to be drawn from such facts. In my judgment, on the facts as stated in the case, each of these questions must be answered in the affirmative. At the time when the contract was made buyers and sellers of cotton seed cake from Port Sudan c.i.f. United Kingdom ports would assume that the goods, as therefore, would be shipped via the canal. The Suez Canal had since its opening been one of the main arteries of international trade, and at the time when the contract was made was the only usual and customary route for the shipment of goods from Port Sudan to United Kingdom ports. No one would think of

A shipping by any other route. It is difficult to conceive of any more fundamental change in such a trade than the closing of the canal, and there is no finding in the Case that, at least up to the end of November, 1956, the route via the Cape was anything more than an emergency route. Though it is true that an increase of freight rate of twenty-five per cent. falling on the seller would not of itself warrant the discharge of the contract, since mere commercial unprofitableness
B does not justify frustration especially in a speculative forward contract (see per LORD SUMNER in *Larrinaga & Co. v. Société Franco-Américaine des Phosphates de Medulla* (16) (1923), 92 L.J.K.B. 455 at p. 465), yet the voyage via the Cape was more than two and a half times the length of the voyage via the canal and included what the author of "The Second World War" feelingly described
C as "the long haul round the Cape"—a circumstance which may involve the seller in quite different obligations as to the condition of the goods on shipment from that involved in shipment via the canal. I feel no doubt at all that the continued availability of the Suez route was a fundamental assumption at the time when the contract was made, that to impose on the sellers the obligation to ship by an emergency route via the Cape would be to impose on them a
D fundamentally different obligation, which neither party could, at the time when the contract was made, have dreamed that the sellers would be required to perform and that, if the parties to the contract had thought of the matter at the time, both, as reasonable men, would have accepted at once that, if the canal was closed for an indefinite period at a time when the sellers were not in breach
E for failure to ship earlier, the contract would be off. Justice and reason require that, in these circumstances, both parties should be relieved from their obligations on the happening of the closing of the canal without default of either party.

This conclusion makes it unnecessary for me to express any concluded opinion on the effect of cl. 17. It is sufficient for me to say that, in my opinion, the closing of the Suez Canal as an act of hostilities did, on the facts found, prevent
F fulfilment of the sellers' obligation to ship, properly construed.

Umpire's award set aside.

Solicitors: *Richards, Butler & Co.* (for the appellants); *Thomas Cooper & Co.* (for the respondents).

[Reported by E. COCKBURN MILLAR, Barrister-at-Law.]

HARGREAVES *v.* BRETHERTON AND ANOTHER.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J.), July 23, 1958.]

Perjury—Whether civil action lies at suit of injured party.

The plaintiff pleaded that the first defendant had falsely and maliciously and without just occasion or excuse committed perjury as a witness at the plaintiff's trial on charges of criminal offences and that, as a result, the plaintiff had been convicted and sentenced to eight years' preventive detention. The allegation was denied and on further objection in point of law,

Held: an action did not lie at the suit of a person who alleged that he had been damnified by a witness having given false evidence against him at a trial before a court of justice: the relevant paragraphs in the statement of claim should, therefore, be struck out.

[As to perjury as a criminal offence, see 10 HALSBURY'S LAWS (3rd Edn.) 626, paras. 1186, 1187; as to the privilege of witnesses against actions for evidence given, see 20 HALSBURY'S LAWS (2nd Edn.) 461, para. 563.]

Cases referred to:

- (1) *R. v. Skinner*, (1772), Lofft 54; 98 E.R. 529; 32 Digest 104, 1348.
- (2) *Revis v. Smith*, (1856), 18 C.B. 126; 25 L.J.C.P. 195; 27 L.T.O.S. 106; 20 J.P. 453; 139 E.R. 1314; 32 Digest 107, 1378.
- (3) *Henderson v. Broomhead*, (1859), 4 H. & N. 569; 28 L.J.Ex. 360; 33 L.T.O.S. 302; 157 E.R. 964; 32 Digest 108, 1393.
- (4) *Lake v. King*, (1670), 1 Mod. Rep. 58; 1 Lev. 240; 1 Saund. 131; 86 E.R. 729; 32 Digest 109, 1420.
- (5) *Watson v. M'Ewan*, *Watson v. Jones*, [1905] A.C. 480; 74 L.J.P.C. 151; 93 L.T. 489; 32 Digest 109, 1407.
- (6) *Dawkins v. Rokeby (Lord)*, (1875), L.R. 7 H.L. 744; 4 F. & F. 806; 39 Digest 329, 150.
- (7) *Munster v. Lamb*, (1883), 11 Q.B.D. 588; 52 L.J.Q.B. 726; 49 L.T. 252; 47 J.P. 805; 32 Digest 105, 1368.

Preliminary Point of Law.

In an action for damages for negligence and breach of duty the plaintiff included in para. 21 of his statement of claim an allegation that the first defendant had committed perjury at the plaintiff's trial in 1953 for offences against the Prevention of Fraud (Investments) Act, 1939, and that as a result the plaintiff was convicted and sentenced to eight years' preventive detention. In para. 16 of their defence the first named defendant denied that he committed perjury in the course of the plaintiff's trial or that in giving his evidence as he did he was in breach of any duty to the plaintiff. The defendants further pleaded, in effect, that even if the allegation had been true it would not have given to the plaintiff any cause of action against the defendants.

An order was made by Master DIAMOND on June 18, that the contention raised in para. 16 that an action did not lie at the suit of a person who said that he had been damnified by a person who was alleged to have given false evidence against him, should be decided as a preliminary point of law under R.S.C., Ord. 25, r. 2.

Martin Jukes, Q.C., and *Bernard Caulfield* for the applicants (the defendants).
Ashe Lincoln, Q.C., and *L. A. de Pinna* for the respondent (the plaintiff).

LORD GODDARD, C.J.: The point that is raised by the defendants in para. 16 of the defence is in answer to an allegation made in the statement of claim under which the plaintiff alleges that on his indictment at the Gloucestershire Assizes the first defendant was called as a witness for the prosecution, and gave false evidence against him and committed perjury whereby he was convicted.

A The objection taken by the defendants in their defence was, after denying that the first defendant had committed perjury, they pleaded in para. 16 that

B “assuming the first defendant committed perjury or spoke falsely, maliciously or without just occasion or excuse in relation to the facts of the plaintiff’s trial or uttered false statements concerning the plaintiff in the course of the plaintiff’s said trial, then such acts or omissions on the part of the first defendant do not give to the plaintiff any cause of action against the defendants, alternatively that perjury or other false statement made by a witness in the course of criminal proceedings does not constitute a tort nor any other wrong giving rise to a civil remedy in damages at the suit of him who has been convicted or who has suffered damage by or because of such perjury or false statement.”

C Therefore the simple point that I have to decide is whether or not an action lies at the suit of the person who says that he has been damnified by the person who has given false evidence against him. In my opinion it is clear beyond peradventure nowadays that such an action will not lie. The matter has been adumbrated and considered since the 38th year of Queen Elizabeth 1*. It was raised again in the reign of James 1†. It is true that in Coke’s Institutes‡ there is a passage by that most learned person which gives rise to an argument that an action would lie. The two cases that were decided in the reigns of Queen Elizabeth and of James decided that it would not. But I do not propose to deal with those cases at any length because we can find modern authority to the effect that such an action would not lie, and nobody has been able to point to any action in the whole history of our law, although, as I say, this point was raised as far back as the 38th year of Queen Elizabeth, in which such an action has lain.

E We might, first of all, turn to LORD MANSFIELD in *R. v. Skinner* (1) ((1772), Lofft 54). That was an indictment that had been preferred for scandalous words spoken of a jury by one of His Majesty’s Justices of the Peace. LORD MANSFIELD, on a motion to quash the indictment, said (*ibid.*, at p. 56):

F “I am willing, as neither Serjeant Davy, nor Mr. Buller, find any precedent in the history of England, for an indictment of this kind, to give them time till next term to find any. What Mr. Lucas has said is very just; neither party, witness, counsel, jury, or judge, can be put to answer, civilly or criminally, for words spoken in office.”

G That is a perfectly clear statement by one of the greatest common lawyers that ever lived, that for words spoken by a witness “in office,” which means, for this purpose, in giving evidence, he cannot be put to answer either civilly or criminally.

H The matter has been dealt with even more concisely and clearly in a series of cases beginning with *Revis v. Smith* (2) ((1856), 18 C.B. 126). JERVIS, C.J., in that case, which was heard in 1856, giving the first judgment of the court, said this (*ibid.*, at p. 140):

I “I am of opinion that this action will not lie. Mr. Brown admits that the proceeding is somewhat novel. It is in truth entirely so, and, as I think totally without principle or analogy to sustain it. So far as appears from the declaration, it is quite consistent that the defendant believed what he stated to be true; and we are called upon to punish him in a civil action for a statement made by him in the course of a judicial proceeding, which statement he believed himself to be justified in making, and had an interest in making. But, take the converse case [that is to say, where he did not believe the statement]. Mr. Brown says that the moment a witness swerves

* See *Damport v. Simpson*, 2 Cro. Eliz. 520.

† See *Eyres v. Sedgewicke*, 2 Cro. Jac. 601.

‡ 3 Coke’s Institutes, c. 74, p. 164.

from the truth, an action lies against him at the suit of the party injured. What would be the consequence of that? Why, that you would be trying him for perjury; and, by the testimony of one witness in a civil suit, you would be convicting a man of a crime of which he could not be convicted in a court of criminal jurisdiction without the concurring testimony of two. By the general policy of the law, a witness is privileged: and I see nothing to take this case out of the general rule."

CRESSWELL, J., said (*ibid.*, at p. 141):

"I entirely agree with my Lord. It is enough to say that the world has gone on very well without such actions as these; and I doubt whether it would continue to do so if such things were allowed. It would be highly inconvenient to hold a man liable where he gives evidence which is relevant to the cause. It is admitted that this action is without precedent. It certainly is not within any principle that I am aware of; and I am not disposed to introduce it."

CROWDER, J., and WILLES, J., concurred. The learned lord chief justice there pointed out what occurred to me directly I read this pleading and understood what the point was that I had to try; namely, that it would be most unfortunate if an action for damages for alleged perjury could be brought when nobody had been convicted of perjury, but, quite apart from that, merely on the allegations of a person who says that somebody has committed perjury, which led to him being damnified either by being convicted or not. Half the prisoners in England would be trying to bring actions in these days where the welfare state provides legal aid, and there would be an abundance of these matters in these courts, which would be a most unfortunate procedure. One has to remember that people are brought to give evidence, sometimes by subpoena, and can be compelled to give evidence. That does not excuse them for committing perjury, but the penalty for committing perjury is not that they should be asked to pay damages, but that they should be sentenced for the crime which has been committed, and sentenced by a court of law.

We can go on to other cases which have dealt with the same matter. There was *Henderson v. Broomhead* (3) ((1859), 4 H. & N. 569). There an action was sought to be brought against a person who made an affidavit in support of a summons taken out in the cause which was scandalous, false and malicious, though the person scandalised and who complained was not a party to the cause. It was held that no such action lay, and ERLE, J., said (*ibid.*, at p. 576):

"The question is, whether an action will lie against a party who in the course of a cause made an affidavit which contained matter scandalous to the present plaintiff, and which was false and malicious . . . The question then is, whether, instead of prosecuting the person who made the affidavit, for perjury, the party aggrieved has a right to bring a civil action. An action will not lie for defamatory words spoken in the course of litigation which are relevant to that litigation. The authorities are collected in the note to *Lake v. King* (4) ((1670), 1 Saund. 131), and the general rule is there stated: 'No false or scandalous matter contained in articles of the peace exhibited to justices of the peace, or in any other proceeding in a regular course of justice, will make it libellous.' . . . The party may be punished, and the abuse repressed by a prosecution for perjury, the result of which is to make the defendant infamous if he is convicted. It is said that the civil remedy should be allowed for the purpose of indemnifying the party injured. But the balance of inconvenience is strong against such an action. Witnesses would be subjected to peril. A party might be allowed, by his own single testimony against the oath of the witness, to obtain a verdict and get large damages, whereas the rule of law is that an oath shall never be deemed false or the witness perjured on the unsupported testimony of a single

A witness . . . The case of *Revis v. Smith* (2) is a very recent authority that though an affidavit made in a judicial proceeding is false, slanderous and malicious, no action will lie against the party making it. We have therefore a large collection of cases where from time to time parties have attempted to get damages in cases like the present, but in no one instance has the action ever been held to be maintainable. If for centuries many persons
 B have attempted to get a remedy for injuries like the present, and there is an entire absence of authority that such remedy exists, it shows the unanimous opinion of those who have held the place which we do now, that such an action is not maintainable."

CROMPTON, J., concluded his judgment in that case by saying that this attempt was really brought in despair.

C Again, so far as this court is concerned, how can I possibly ignore what the EARL OF HALSBURY, L.C., said in *Watson v. M'Ewan* (5) ([1905] A.C. 480 at p. 486):

"The broad proposition I entertain no doubt about, and it seems to me to be the only question that properly arises here; as to the immunity of a witness for evidence given in a court of justice, it is too late to argue that as if it were doubtful. By complete authority, including the authority of this House [and in this I think he is referring to *Dawkins v. Lord Rokeby* (6) ((1875), L.R. 7 H.L. 744)] it has been decided that the privilege of a witness, the immunity from responsibility in an action when evidence has been given by him in a court of justice, is too well established now to be shaken. Practically I may say that in my view it is absolutely unarguable—it is settled law and cannot be doubted. The remedy against a witness who has given evidence which is false and injurious to another is to indict him for perjury; but for very obvious reasons, the conduct of legal procedure by courts of justice, with the necessity of compelling witnesses to attend, involves as one of the necessities of the administration of justice the immunity of witnesses from actions being brought against them in respect of evidence they have given. So far the matter, I think, is too plain for argument."

In my opinion, too, it is too plain for argument. That decision in the House of Lords in 1905, I think, makes it unnecessary for me to consider at length the judgments in *Munster v. Lamb* (7) ((1883), 11 Q.B.D. 588) and the other judgments cited to me today.

G I hope counsel for the plaintiff will not think that I have been discourteous to him if I say that it seems to me that this is an obvious "try on." Attempts have been made over a period of two hundred or three hundred years to bring these actions, but they have universally failed. In my opinion, as LORD HALSBURY said, it is quite unarguable.

H I therefore decide that the contention by the defendants in para. 16 of the defence is correct. It follows from that, I think, that paras. 21 and 22 of the statement of claim must be struck out.

Order that the relevant paragraphs of the statement of claim be struck out as disclosing no cause of action.

Solicitors: *Barlow, Lyde & Gilbert* (for the applicants (defendants)); *Basil Greenby & Co.* (for the respondent (plaintiff)).

[Reported by E. COCKBURN MILLAR, Barrister-at-Law.]

INDEPENDENT TELEVISION AUTHORITY AND ANOTHER v. INLAND REVENUE COMMISSIONERS.

[CHANCERY DIVISION (Wynn-Parry, J.), July 8, 9, 15, 1958.]

Stamp Duty—Bond, covenant, or instrument—Security—Executory agreement creating obligation—Agreement providing for services—Total amount ultimately payable ascertainable—Specified sum subject to increase or decrease in certain eventualities—Stamp Act, 1891 (54 & 55 Vict. c. 39), Sch. 1.

Where it appears on the face of a deed (being a “security” within the meaning of that word in Sch. 1 to the Stamp Act, 1891, under the head, “Bond, covenant” etc.) that there is a specified sum payable by one party to the deed to the other party, then, notwithstanding that the specified sum may be increased or may be reduced in part or to nothing on the happening of a contingency, the deed is liable to be charged to stamp duty calculated on the specified sum (see p. 134, letters G and H, post).

By an agreement under seal dated May 23, 1955, a programme contractor was to provide programmes (which might include advertisements) to be broadcast by Independent Television Authority from stations, on days and within hours specified in the agreement. Broadcasting was to commence on a date between Aug. 15, 1955, and Nov. 15, 1955, to be determined by the authority by giving notice to the contractor, and the contractor was to continue as a programme contractor under the agreement until July 29, 1964. The contractor was to pay the authority a fee of £495,600 per annum until Mar. 31, 1958, or the expiration of two and a half years from the commencement of broadcasting whichever was the later, and a fee of £536,900 thereafter. These payments might be increased or decreased in the event of an increase or decrease of five per cent. or more in a half-yearly index figure defined in the agreement compared with the index figure for all items in the interim index of retail prices published by the Board of Trade. The Commissioners of Inland Revenue assessed the stamp duty payable on the basis of the ad valorem stamp duty chargeable on a “bond, covenant, or instrument of any kind whatsoever: (i) Being the only or principal or primary security for any annuity . . . or for any sum or sums of money at stated periods” under Sch. 1 to the Stamp Act, 1891, and computed the amount on the total of the sums specified as annual fees (£495,600 and £536,900) for the period Nov. 15, 1955, to July 29, 1964. On appeal,

Held, the stamp duty was properly computed, since

(i) the agreement was a security within head “Bond etc.” of Sch. 1 to the Stamp Act, 1891, notwithstanding that it was not collateral or ancillary to any other document but itself created the obligation (dicta of WRIGHT, J., and COLLINS, J., in *Jones v. Inland Revenue Comrs.*, [1895] 1 Q.B. at pp. 492 and 495, followed), and though it dealt with the provision of services for a consideration (*Jones v. Inland Revenue Comrs.*, supra, applied) and was an executory contract at the time of execution (*British Italian Corpn., Ltd. v. Inland Revenue Comrs.*, Sergeant on Stamp Duties (3rd Edn.) 334, C.A., followed).

(ii) the duty was to be computed not on the sum payable up to Mar. 31, 1956, but on the total amount payable over the whole period of the agreement, since, the agreement being “for a certain and definite period”, that amount was such that “the total amount to be ultimately payable [could] be ascertained” under Sch. 1 to the Stamp Act, 1891, notwithstanding that the specified sum might be subject to an increase or a decrease in certain eventualities.

A *Underground Electric Rys. Co. v. Inland Revenue Comrs.* ([1905] 1 K.B. 174, [1906] A.C. 21) and *Underground Electric Rys. Co. of London, Ltd. v. Inland Revenue Comrs.* ([1914] 3 K.B. 210, [1916] 1 K.B. 306) applied.

B [For stamp duty payable on a bond, covenant or other instrument, see 28 HALSBURY'S LAWS (2nd Edn.) 477, para. 1008, and 3 HALSBURY'S LAWS (3rd Edn.) 330, para. 621; and for cases on the subject, see 39 DIGEST 275, 276, 604-612.]

For the Stamp Act, 1891, Sch. 1, "Bond, covenant, or instrument", see 21 HALSBURY'S STATUTES (2nd Edn.) 662.]

Cases referred to:

- C** (1) *Jones v. Inland Revenue Comrs., Sweetmeat Automatic Delivery Co. v. Inland Revenue Comrs.*, [1895] 1 Q.B. 484; 64 L.J.Q.B. 84; 71 L.T. 763; 39 Digest 276, 607.
- (2) *National Telephone Co. v. Inland Revenue Comrs.*, [1899] 1 Q.B. 250; 68 L.J.Q.B. 222; 79 L.T. 514; *affd.* H.L., [1900] A.C. 1; 39 Digest 276, 608.
- D** (3) *County of Durham Electrical Power Distribution Co. v. Inland Revenue Comrs.*, [1909] 2 K.B. 604; 78 L.J.K.B. 1158; 101 L.T. 51; 73 J.P. 425; 39 Digest 276, 613.
- (4) *British Italian Corpn., Ltd. v. Inland Revenue Comrs.*, [1921] W.N. 220; Sergeant on Stamp Duties (3rd Edn.) 334; 39 Digest 277, 615.
- (5) *Underground Electric Rys. Co. v. Inland Revenue Comrs.*, [1905] 1 K.B. 174; *affd.* H.L., [1906] A.C. 21; 75 L.J.K.B. 117; 93 L.T. 819; 39 Digest 282, 655.
- E** (6) *Underground Electric Rys. Co. of London, Ltd. & Glyn, Mills, Currie & Co. v. Inland Revenue Comrs.*, [1914] 3 K.B. 210; *affd.* C.A., [1916] 1 K.B. 306; 85 L.J.K.B. 356; 114 L.T. 111; 39 Digest 276, 614.

Case Stated.

F The appellants sought the decision of the court on the amount of stamp duty chargeable on an instrument presented to the Commissioners of Inland Revenue under s. 12 of the Stamp Act, 1891, for their opinion as to the amount of stamp duty chargeable. The instrument was an agreement under seal dated May 23, 1955, which was made between the appellants, Independent Television Authority of the one part, and Associated-Rediffusion, Ltd., the contractor, of the other part. The authority was established under the Television Act, 1954, with the function for ten years from July 30, 1954, of providing television broadcasting services additional to those of the British Broadcasting Corporation. Under s. 2 of the Act, the programmes broadcast by the authority were to be provided, not by the authority, but by persons who had the right and duty to provide programmes (which might include advertisements) to be broadcast by the authority under contracts with the authority and in consideration of payments made to it.

H The agreement the subject of the proceedings was a contract of this nature. Under it, in consideration of payments to be made by the contractor to the authority and on the terms and subject to the conditions contained in the agreement, and to the provisions of the Act, the contractor became a programme contractor for a specified term and had the right and was subject to the duty to provide programmes to be broadcast by the authority. Without prejudice to the exercise by the authority of a statutory power to arrange for the provision of parts of programmes unsuitable for provision by programme contractors to secure a proper balance, the contractor was to provide programmes and the authority to broadcast them from stations on days and within hours and otherwise in accordance with terms and conditions specified in the agreement. Broadcasting was to commence on a date between Aug. 15, 1955, and Nov. 15, 1955, to be determined by the authority by giving twenty-eight days' notice to the contractor. There was provision for variation of programmes, for substitution

of stations and for discontinuance of broadcasting, each in specified circumstances. Subject to these provisions, to the contractor's duly performing its obligations under the agreement and to any lawful exercise by the authority of its right to arrange for the provision of certain programmes (*supra*) the contractor was to have the sole and exclusive right to provide the programmes broadcast from the specified stations or any substituted station during the specified days. The term for which the contractor was to be a programme contractor was to commence on the date of the agreement and was to continue in force until July 29, 1964, subject to avoidance or determination as specified. Both the authority and the contractor had power to determine the agreement in specified events.

The contractor was bound to make payments to the authority as provided in Sch. 3, which provided that as from the commencement date of broadcasting from the station described in Sch. 1 (i.e., between Aug. 15, 1955, and Nov. 15, 1955), the contractor should pay to the authority a fee of £495,600 per annum until Mar. 31, 1958, or the expiration of two and a half years from the commencement date, whichever was the later, and a fee of £536,900 thereafter. These payments might be increased or decreased in the event of an increase or decrease of five per cent. or more in the half-yearly index figure defined in the agreement compared with the basic index figure, which was defined as meaning the average of the index figures for all items in the interim index of retail prices published by the Board of Trade for specified months. The authority had the right to increase fees after the expiration of three and a half years from the commencement date, subject to an upper limit, and there was provision for a review of fees by arbitration in certain circumstances.

The commissioners were of opinion that the agreement was chargeable with ad valorem stamp duty under the head of charge "Bond, covenant, or instrument of any kind whatsoever: (i) Being the only or principal or primary security for any annuity . . . or for any sum or sums of money at stated periods . . ." in Sch. 1 to the Stamp Act, 1891. They were further of opinion that the agreement was not "for the term of life or any other indefinite period" within the meaning of this head of charge entailing a stamp duty of £5 per cent. of the sum periodically payable, but "for a definite and certain period, so that the total amount to be ultimately payable can be ascertained", and that the agreement was chargeable with the "same ad valorem duty as a bond or covenant for such total amount" in accordance with the terms of the head of charge. They were also of opinion that the "definite and certain period" within the meaning of this head of charge under the agreement was the period from Nov. 15, 1955 (the last date at which broadcasting was to begin under the terms of the agreement) to July 29, 1964 (up to which date the agreement was to continue in force). They assessed the duty on the agreement on this basis pursuant to s. 1 and s. 4 of the Stamp Act, 1891, the head of charge "bond, covenant," etc., the head of charge "mortgage, bond, debenture, covenant", etc., in Sch. 1 (to which securities for a definite and certain period chargeable under the head "bond, covenant", etc., were referred) and other relevant enactments, at £11,431, made up as follows: £495,600 per annum from Nov. 15, 1955, to May 14, 1958 (two and a half years) £1,239,000; £536,900 per annum from May 15, 1958, to July 29, 1964 (six years and seventy-six days) £3,333,193; total £4,572,193 (i.e., exceeding £4,572,100 but not exceeding £4,572,700) on which the ad valorem duty was £11,430 10s. with 10s. for deed stamp under s. 4.

The appellants contended that (i) the agreement was not liable to ad valorem duty at all, as not being a "security" within the meaning of the head of charge "bond, covenant", etc., in Sch. 1; (ii) alternatively, it was not liable to ad valorem duty at all as being a security for a definite period which was not certain; (iii) if the agreement was liable to ad valorem duty as a security for a definite and certain period, it was chargeable only in respect of the fee payable from Nov. 15, 1955, to Mar. 31, 1956. They required the commissioners to state a

A case under s. 13 of the Stamp Act, 1891. The question for the decision of the court was whether the agreement was liable to duty as assessed by the commissioners and if not to what duty was it liable.

Geoffrey Cross, Q.C., and J. G. Monroe for the appellants.

John Pennycuik, Q.C., and E. Blanshard Stamp for the Crown.

Cur. adv. vult.

B

July 15. **WYNN-PARRY, J.**, read the following judgment: The first point in this case which counsel advanced on behalf of the appellants is that the agreement of May 23, 1955, to which I shall refer as "the agreement", was not a security within the meaning of that word as used in Sch. 1 to the Stamp Act, 1891, under the heading "Bond, covenant, or instrument of any kind whatsoever". It is clear from the authorities that a document can be a security under the above heading although it is not collateral or ancillary to any other document but itself creates the obligation: see *Jones v. Inland Revenue Comrs.* (1) ([1895] 1 Q.B. 484 per **WRIGHT, J.**, at p. 492 and per **COLLINS, J.**, at p. 495). Counsel, however, contended that broadly speaking the agreement dealt with the provision of services for a consideration and that, while an agreement involving the hire of chattels (see *National Telephone Co. v. Inland Revenue Comrs.* (2), [1899] 1 Q.B. 250) or an agreement involving the sale of goods (see *County of Durham Electrical Power Distribution Co. v. Inland Revenue Comrs.* (3), [1909] 2 K.B. 604), in both of which instances property passed, could fall within the word "security" under the above heading in Sch. 1 to the Stamp Act, 1891, an agreement involving the provision of services did not fall within that word "security".

E

In my view, having regard to the facts in *Jones v. Inland Revenue Comrs.* (1), I am bound to reject this contention. In the statement of facts in that case it is stated:

F

"The instrument chargeable with duty was an agreement under seal for the supply of telephonic communication, dated July 1, 1894, and made between the National Telephone Co., Ltd., of the one part, and the appellant, carrying on business as Keith, Prowse & Co., of the other part. It contained recitals that the appellant was desirous of establishing telephonic communication from her head office, No. 48, Cheapside, to her London branches and to various theatres, hotels, and other places set out in Sch. 1, such telephonic communication being by means of metallic circuits and including telephone instruments at the head office, and that the company had agreed to supply the means of such telephonic communication and to maintain the same upon the terms and conditions provided by the agreement. By cl. 1 the company undertook to erect and maintain in good working order the telephonic lines and apparatus."

G

H Clearly, therefore, the consideration moving from the telephone company was the provision of services, yet the agreement in question was charged as a security.

I

The next contention advanced by counsel for the appellants was that, as the agreement was executory at the time of its execution, it could not be a security within the above heading. It appears to me, however, that I am bound by the authorities to reject this contention also. In *British Italian Corpn., Ltd. v. Inland Revenue Comrs.* (4) reported shortly in [1921] W.N. 220, but at length in **SERGEANT ON STAMP DUTIES** (3rd Edn.) at p. 334, **ROWLATT, J.**, indicated clearly that he would have liked to accede to the argument that a wholly executory contract could not be regarded as a security, but held himself bound to do so by *National Telephone Co. v. Inland Revenue Comrs.* (2). In the Court of Appeal both **LORD STERNDALÉ, M.R.**, and **ATKIN, L.J.**, treated the matter as settled by *Jones v. Inland Revenue Comrs.* (1) and *National Telephone Co. v. Inland Revenue Comrs.* (2), pointing out that in each of those cases the instrument in question was executory at the time it was made. It appears to me, therefore, that,

certainly so far as this court is concerned and, I should have thought with respect, also so far as the Court of Appeal is concerned, this point is not open to the appellants. It is true that *National Telephone Co. v. Inland Revenue Comrs.* (2) was taken to the House of Lords, but in the very short speech of the EARL OF HALSBURY, L.C., this point was not expressly dealt with. Whether or not the point should be treated as covered by the decision of the House of Lords is, however, not one with which I am concerned. I therefore conclude that the agreement is a security within the above heading in Sch. 1 to the Stamp Act, 1891.

The second main contention put forward by counsel for the appellants is that, assuming that the agreement is a security, as I have held it to be, and admitting, as counsel does, that it is for a definite and certain period, it is chargeable only in respect of the fee payable during the period from Nov. 15, 1955 (the latest date by which broadcasting was to begin) until Mar. 31, 1956 (the first, though broken, half-yearly period contemplated under the agreement); in which case the duty would amount to approximately £500. Put shortly, counsel's contention is that, on the true construction of the agreement, it is impossible at the date of the agreement to predicate as regards the period after Mar. 31, 1956, what sums will be payable, because of the presence of the provisions for increase or diminution of the sums specified in para. 1 of Sch. 1 to the agreement. On the authorities, he accepts that, if on the true construction of the agreement either a minimum sum or a maximum sum is discoverable, then the charge would operate on that minimum or maximum sum as the case might be: but he contends that it is insufficient to find only a specified sum, which is neither a maximum nor a minimum sum, but which is only a line, so to speak, from which to measure the fluctuations permitted by the agreement. Counsel for the Crown on the other hand contends that on the authorities it is sufficient, for the purpose of attracting the charge, that there should be a specified sum, and that it is immaterial whether that specified sum is liable to increase or diminution. or that it is impossible as at the date of the agreement to predicate the maximum on increase or the minimum on diminution.

The relevant words in the charge are "so that the total amount to be ultimately payable can be ascertained" (Stamp Act, 1891, Sch. 1, bond, covenant, or instrument, para. (1)). Were the matter *res integra*, then I should be inclined to say that the condition of liability to charge was that, by an examination of the instrument the total amount payable under the instrument, i.e., everything that is payable, must be ascertainable as at the date of the instrument, with the consequence that, if the total were not so ascertainable, then the charge would not operate. No doubt if this construction had found high judicial favour, the Stamp Act, 1891, would have been altered, but it did not find such favour. In the agreement which fell to be considered in *County of Durham Electrical Power Distribution Co. v. Inland Revenue Comrs.* (3) the consumers were to pay for all electric current supplied thereunder a fixed charge of £57 10s. per quarter and in addition 1d. per Board of Trade unit for all current supplied and consumed as indicated by the appellants' meters. It is clear, so far as regards the additional charge of 1d. per Board of Trade unit, that the amount which might become payable in respect of that liability could not be ascertained at the date of the execution of the agreement. The commissioners assessed the appellants' liability to stamp duty on the basis that duty was payable at the rate of 2s. 6d. per £100 on £57 10s. for seven years, the term of the agreement, and their assessment was upheld by the Court of Appeal. Thus the appellants were charged on a sum which was less than the total amount which would be ultimately payable. In other words, the court disregarded that part of the monetary consideration which could not be ascertained. Clearly, therefore, I cannot give the words in question the simple construction which otherwise I would have been inclined to give them.

A I turn now to consider the conflicting contentions to which I have referred: on the one hand that a document properly describable as a security is not chargeable to stamp duty, unless it contains provision for the payment of a minimum or maximum sum; and on the other hand that such a document is chargeable if it contains provision for the payment of a specified sum, notwithstanding that such specified sum is liable to be increased or diminished on the happening of certain contingencies.

B It is clearly established by the authorities that whether the sum required to attract the charge must be a maximum or minimum sum on the one hand or merely a specified sum on the other hand, the fact that such sum is payable on a contingency or a number of contingencies is immaterial: see *Underground Electric Rys. Co. v. Inland Revenue Comrs.* (5) ([1905] 1 K.B. 174, affirmed by the House of Lords ([1906] A.C. 21), to which case I will refer as "the first *Underground Railways* case", and *Underground Electric Rys. Co. of London, Ltd., & Glyn, Mills, Currie & Co. v. Inland Revenue Comrs.* (6) ([1914] 3 K.B. 210, affirmed in the Court of Appeal [1916] 1 K.B. 306), to which I will refer as "the second *Underground Railways* case".

D Before coming to an examination of these two cases, I take note that, as was pointed out in argument, under the agreement which the court had to consider in *County of Durham Electrical Power Distribution Co. v. Inland Revenue Comrs.* (3), not merely was there a liability on the consumer to pay for current consumed (a liability necessarily incapable of quantification at the date of the agreement) in addition to the fixed charge of £57 10s. per quarter, but the fixed charge could in certain circumstances be diminished to £50. Nevertheless, to my mind the principle which governs the present case is to be extracted from the two *Underground Railways* cases. The agreement in the first *Underground Railways* case (5) was one which fell to be charged, if at all, under s. 56 (2) of the Stamp Act, 1891, but for the purposes of this case that circumstance is immaterial. Clause 3, which was the relevant clause of the agreement, provided as follows:

F "The profits of the new company available for dividend in respect of each year shall be applied in the following order and manner—that is to say:—
G 'First, in payment of a cumulative dividend at the rate of five per cent. per annum up to the end of such year on the amount for the time being paid up on any shares for the time being issued by the new company; and, secondly, in paying to the traction company or its assigns as a further part of the consideration for the said sale such a sum as shall be equal to a dividend of three per cent. for such year on the amount for the time being paid up on such of the original ordinary share capital of £5,000,000 in the new company as shall for the time being have been issued by the new company.'

H It is to be observed that under "first" the dividend payable on the shares of the new company was a cumulative dividend, whereas the sum payable under "secondly" was in respect of non-cumulative dividend, and was therefore payable exclusively out of the profits, if any, of the new company of the year in respect of which it was payable under the agreement. Thus the sum payable under "secondly" might be reduced in part or even to nothing, a contingency which was recognised by LORD LINDLEY in his opinion in this case in the House of Lords. The approach to the matter which the commissioners made, as set out in the statement of facts, is not without interest ([1905] 1 K.B. at p. 175):

I "The commissioners found that at the date of the agreement the whole of the ordinary share capital of the new company to the amount of £5,000,000 had been issued, and that the amount paid up was £1,300,000, upon which sum a dividend of £3 per cent. for a year would amount to £39,000. The commissioners were of opinion that the sum contingently payable out of profits in each year under cl. 3 (2) was part of the consideration for the sale,

and that, so far as such sum was capable of ascertainment at the date of the agreement, it was liable to ad valorem conveyance duty at the rate of 10s. per cent."

COLLINS, M.R., in the course of his judgment said (*ibid.*, at p. 180):

"Another point was taken that, before the question of contingency is reached, there must be an ascertained sum in respect of which this duty can be levied, and it is said that, in this case, there is absolute uncertainty about the sum upon which the three per cent. dividend would be payable, because that sum is paid-up capital, and the agreement contemplates more capital being paid up over and above the sum then paid up. Upon that ground, it is said, that sum is too indefinite to be the subject-matter of an ad valorem duty; and that a fixed factor is not available in the calculation, inasmuch as the amount is capable of being increased. That objection does not impress me, because if I once find that there is a fixed minimum already reached at the date of the agreement, it does not seem to me that the fact that the minimum may be afterwards exceeded alters the fixity of that which has already been ascertained, namely, the sum below which the capital cannot fall, and the sum, therefore, upon which the three per cent. dividend will have to be paid if the other contingencies, which I will deal with in a moment, arise. Therefore that factor of indefiniteness, so far as it rests on the fact that the capital is capable of increase, does not seem to introduce any such uncertainty into the calculation as to prevent the incidence of the taxation."

Counsel for the appellants fastened on the words "if I once find that there is a fixed minimum already reached at the date of the agreement", and he contended that this must be regarded as a case which was decided on the basis that the agreement contained a fixed minimum. I think, however, that the sense in which the Master of the Rolls used the words "a fixed minimum" is to be discovered from a later passage in his judgment, when he quoted the argument of the Attorney-General: see [1905] 1 K.B. at p. 181. The Attorney-General argued that the Crown was entitled to regard the sum ascertained by the commissioners to have been paid at the date of the agreement as an absolutely fixed and permanent factor on which the sum of three per cent. would have to be paid, and with this view I agree.

Now as I understand that passage its emphasis is on liability as at the date of the agreement. The circumstance that by a calling up of uncalled capital the amount payable might be increased was not to be regarded as a circumstance which in any way altered the character of the sum paid up at the date of the agreement, as being "an absolutely fixed and permanent factor". It follows, in my view, by parity of reasoning, that inability in any year on the part of the new company to pay the sum provided for under cl. 3 "secondly" of the agreement would not affect that sum as being "an absolutely fixed and permanent factor upon which the three per cent. would have to be paid". It would still remain, in the words of the Master of the Rolls, a "fixed minimum" in the sense in which it is used by him on p. 180 of the report, as interpreted in the later passage on p. 181 of the report which I have quoted, namely a "fixed and permanent factor". In other words, on the one hand the sum payable might be increased on the happening of a contingency which might never happen, viz., the calling up of uncalled capital; on the other hand the sum payable might in any year be reduced either in part or to nothing by the happening of a contingency which might never happen, namely, insufficiency or total absence of profits. What was ascertainable at the date of the agreement was the liability to pay on the amount of capital of the new company called up at that date, and that was the "fixed and permanent factor."

In the House of Lords ([1906] A.C. 21) LORD LINDLEY delivered the only reasoned opinion. He uses the phrase "minimum sum". As I understand his opinion, he uses this phrase because, as he says ([1906] A.C. at p. 22): "The

A amount payable in future was liable to be increased". Let me read the first paragraph of his speech (ibid.):

"My Lords, when the stamp duty payable on the conveyance in this case had to be ascertained, part of the consideration for the sale was three per cent. of the then paid up capital of the purchasing company. This sum was a minimum sum and it was payable periodically for an indefinite time.
B The amount payable in future was liable to be increased, but not to be diminished, except in certain events, to which I will now allude. One of these events, and the only one in my opinion which creates any difficulty, was the possible insufficiency of the profits of the company to pay the amount referred to after paying a dividend of £5 per cent. on the paid-up capital of the company. That dividend of five per cent. had to be paid out of the
C profits of the new company to its shareholders before any further payment became payable to the selling company. The minimum sum payable periodically was so payable subject to a contingency, viz., the existence of a sufficiency of profits, to pay first a dividend of five per cent. and then a further dividend of three per cent. We have therefore an ascertained minimum amount payable periodically as part of the consideration of the
D sale, but payable on a contingency."

As I understand that paragraph, there was a fixed sum, which LORD LINDLEY calls a minimum sum, which was liable to increase. That fixed sum was liable to be increased on the happening of a contingency, viz., the calling up of further capital, but payment in respect of that fixed sum was also liable to be reduced on the happening of a contingency, viz., lack of profit in the hands of the new
E company. On that analysis, it would appear that the only reason for calling the fixed sum a minimum sum was because it was liable to increase; the liability of the new company thereafter being in respect of an increased sum, whereas an insufficiency of profits in the hands of the new company in any year would only reduce the actual liability of the new company to pay to the amount of the profits, if any, available, but would not reduce the measure of its liability which would
F continue, so that in any year in which sufficient profits were available it would have to pay the fixed or minimum sum. If I am correct in my analysis of the first *Underground Railways* case (5) in the Court of Appeal and in the House of Lords, then I conclude that the real emphasis is on the discovery of a fixed or specified sum ascertainable at the date of the agreement. For myself, I regard the use of the words "minimum sum" as equal to "ascertained" or "specified
G sum." I am fortified in this conclusion because, in his judgment in the second *Underground Railways* case (6), SCRUTTON, J., said ([1914] 3 K.B. at p. 220):

"It is said, however, that in all these cases there was a specified sum or sums at the date of the deed, and that if there is no sum specified at the date of the deed, no stamp duty is payable. I do not think this is true of
H the first *Underground Railways* case (5), where any sum up to three per cent. might be payable depending on amount of profits, and the deed was assessed on the maximum payment which might be required."

That passage appears to me to rob the word "minimum" in the context of the first *Underground Railways* case (5) of the magic with which counsel for the appellants seeks to clothe it. It comes to this. It depends entirely on the point
I of view. If you look at the fixed or specified sum from the point of view of liability to increase, it can be regarded as a minimum sum. If, however, you regard it from the point of view of liability to reduction because of insufficiency of profits, then it can be regarded as a maximum sum. The common characteristic is that it is fixed or specified.

I now turn to consider shortly the second *Underground Railways* case (6). This was a case under the heading "Bond, covenant, or instrument of any kind whatsoever" in Sch. 1 to the Stamp Act, 1891. The facts as set out in the headnote were as follows ([1914] 3 K.B. 210):

"By a deed executed by them the appellants agreed, provided a sufficient number of the holders of ordinary stock of the Central London Railway Co. would take guaranteed stock in exchange for their ordinary stock, to guarantee interest at four per cent. on such guaranteed stock, payable half-yearly, if and to the extent that the profits of the Central London Railway Co. were not sufficient to pay that amount of interest. At the date of the deed it was not known whether a sufficient number of holders of ordinary stock would accede to the arrangement or whether all would so accede, but if they all acceded and if the Central London Railway Co. made no profits in any year, the appellants would be liable to pay £120,000 in that year, being four per cent. on £3,000,000 stock. Held, that the deed was chargeable with ad valorem stamp duty under the heading 'Bond, covenant, or instrument of any kind whatsoever, being the only or principal or primary security for any annuity . . . or for any sum or sums of money at stated periods . . . for . . . [an] indefinite period,' on the maximum sum which might become payable under the deed."

It will be observed that no fixed or specified sum could be ascertained as at the date of the deed, short of the maximum amount which might possibly become payable. SCRUTTON, J., treating the first *Underground Railways* case (5) as one in which the deed in question was assessed on the maximum payment which might be required, said later in his judgment ([1914] 3 K.B. at p. 221):

"For these reasons I am of opinion that under the heading 'Bond' where the maximum sum which can be secured by the instrument is ascertainable from the instrument itself, the ad valorem stamp must be estimated with reference to that sum, though it never may become payable, and it cannot be told at the date of the instrument whether that sum, or any less sum, or any sum at all will in fact be payable."

Here, clearly the learned judge fastened on the maximum sum, because it was the only ascertainable sum. The only characteristic which the sum had to bear was that it should be ascertainable: the fact that it was the maximum amount which might possibly become payable was merely a result flowing from the language of the document. The decision of SCRUTTON, J., was affirmed in the Court of Appeal ([1916] 1 K.B. 306). I do not find it necessary to refer to the judgments, except to point out that no distinction is drawn between "minimum" and "maximum."

On a consideration of the two *Underground Railways* cases (5) (6), which, I think, contain all the necessary material, I extract the following proposition. In the case of a deed, being a security within the meaning of that word as used in Sch. 1 to the Stamp Act, 1891, under the heading "Bond, covenant, or instrument of any kind whatsoever," where it appears on the face of the deed that there is a specified sum payable by one party to the deed to the other party, then, notwithstanding that such specified sum (a) may be increased on the happening of a contingency or (b) may be reduced in part or to nothing on the happening of a contingency, the deed is liable to be charged to stamp duty calculated on such specified sum. In my view, on its true construction, the deed in this case falls within that proposition and therefore the assessment appealed from was correct. The appeal will therefore be dismissed with costs.

Appeal dismissed.

Solicitors: *Allen & Overy* (for the appellants, Independent Television Authority); *Sidney Morse & Co.* (for the appellants, Associated-Rediffusion, Ltd.); *Solicitor of Inland Revenue.*

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

A Re RIDER'S WILL TRUSTS. NELSON AND OTHERS v.
RIDER AND OTHERS.

[CHANCERY DIVISION (Harman, J.), July 16, 17, 1958.]

B *Trust and Trustee—Powers of trustee—Power to invest—“In or upon any stocks . . . guaranteed by the Government of the United Kingdom or of any British Colony or Dependency . . . but not otherwise”—Investments in Dominion stocks and stock of local authority—Whether authorised—Trustee Act, 1925 (15 & 16 Geo. 5 c. 19), s. 1, s. 69 (2).*

C By his will dated Dec. 12, 1908, a testator, who died on Mar. 14, 1909, declared that moneys liable to be invested under his will might be invested
D “in or upon any stocks funds or securities of or guaranteed by the Government of the United Kingdom or of any British Colony or Dependency or in the stock of the Bank of England or the debentures or debenture stock or guaranteed or preference stock or shares of any railway or other company in England or India incorporated by Act of Parliament or Royal Charter . . . or upon real securities in England but not otherwise.” The trustees
E invested in (a) government stocks and securities of Australia, New Zealand and Southern Rhodesia, and (b) Essex County five per cent. redeemable stock 1968/1971. On the question whether the investments were authorised by the will,

F **Held:** the investment clause should be construed generically and the words “but not otherwise” expressed a contrary intention (within s. 69 (2) of the Trustee Act, 1925) in relation to modes or classes of investments other than such as were specifically mentioned in the clause, and did not exclude investments authorised by s. 1 of the Trustee Act, 1925, within those modes or classes; and therefore investments in category (a) above were authorised (for they were of the same mode or class of investment as stocks of a British colony or dependency), but the stock specified in (b) above was not authorised.

Re Westby ([1932] I.R. 444) applied.

G PER CURIAM: I should have been disposed to say that for the purpose of an investment clause a Dominion whose stocks rank in the list kept by the Treasury under the Colonial Stock Act, 1877, could properly be described as a Colony or Dependency, although politically it was nothing of the sort (see p. 139, letter E, post).

[As to investment of trust funds, see 33 HALSBURY'S LAWS (2nd Edn.) 232-244, paras. 415-430; and for cases on the subject, see 43 DIGEST 926-928, 933-935, 3640-3663, 3704-3729.]

H For the Trustee Act, 1925, s. 1, s. 69 (2), see 26 HALSBURY'S STATUTES (2nd Edn.) 52-54, 157.]

Cases referred to:

- I (1) *Re Warren, Public Trustee v. Fletcher*, [1939] 2 All E.R. 599; [1929] Ch. 684; 108 L.J.Ch. 311; 161 L.T. 32; Digest Supp.
(2) *Re Burke, Burke v. Burke*, [1908] 2 Ch. 248; 77 L.J.Ch. 597; 99 L.T. 86; 43 Digest 933, 3710.
(3) *Re Hill, Fettes v. Hill*, [1914] W.N. 132; 58 Sol. Jo. 399; 43 Digest 934, 3720.
(4) *Re Westby*, [1932] I.R. 444; Digest Supp.
(5) *Re Brassey's Settlement, Barclays Bank, Ltd. v. Brassey*, [1955] 1 All E.R. 577; 3rd Digest Supp.
(6) *Re Maryon-Wilson's Estate*, [1912] 1 Ch. 55; 81 L.J.Ch. 73; 105 L.T. 692; 43 Digest 935, 3729.

Adjourned Summons.

By their originating summons, dated Feb. 18, 1958, the plaintiffs, the trustees of the will of Thomas Philip Rider, deceased, asked for the determination of the following questions, amongst others: (i) whether on the true construction of the said will trust moneys liable to be invested thereunder might be invested in or upon any investments for the time being authorised by law for the investment of trust funds; (ii) if the answer to question (i) were in the negative, whether such trust moneys might be invested in or upon any stocks, funds or securities of or guaranteed by the government of (a) any British territory which was a Colony or Dependency at the date of the death of the testator on Mar. 14, 1909, or (b) any British territory which was a Colony or Dependency at the date of the making of such investment.

J. L. Arnold, Q.C., for the plaintiffs, the trustees.

J. D. Waite for the second and third defendants, two annuitants.

C. J. Slade for the fourth defendant, representing residuary legatees.

The first defendant, an annuitant, was not represented.

HARMAN, J.: This is an originating summons to test the ambit of the investment clause in the will, made on Dec. 12, 1908, of Thomas Philip Rider, who died on Mar. 14, 1909. The trusts of the will are still active, as there are surviving annuitants in receipt of annuities under it. While those annuitants are alive, the surplus income is divisible among the charities represented here by the Church Extension Association. On the death of the annuitant who dies last the capital of the fund will be divisible among those charities, or some of them, under an order made by this court, with which I am not concerned today.

The affidavit of Mr. George Alfred Gaul, one of the plaintiffs, shows that the estate includes a number of investments standing in the trustees' names. Category (A) of those investments represents securities undoubtedly authorised by his will. Investments in category (B) likewise are authorised, because, although not of a class which would be authorised for investment, there is a power of retaining securities held by the testator at his death and these are such. Category (C) raises a question about investments in government stocks in Australia, New Zealand and Southern Rhodesia, and it is round them that the controversy centres. Category (D) represents one small investment, which is a trustee stock under the Trustee Act, 1925, and raises the other question before me. There are two small investments under category (E) which, on no view of the will, can be justified and have been made in breach of trust, though it does not look as if any loss to the trust has resulted from the breach.

The testator's will is in odd form. He first gave the annuities, all of which except two have fallen in. He then gave certain legacies and directed the application of the surplus income to specified charities, and declared that when all the annuities fell in, the same charities should take the corpus. Clause 10 is in these terms:

"I declare that all moneys liable to be invested under this my will may be invested in or upon any stocks funds or securities of or guaranteed by the Government of the United Kingdom or of any British Colony or Dependency or in the stock of the Bank of England or the debentures or debenture stock or guaranteed or preference stock or shares of any railway or other company in England or India incorporated by Act of Parliament or Royal Charter and paying a dividend on its ordinary stock or shares or upon real securities in England but not otherwise."

That was a form of investment clause which one may suppose was much more ordinary in 1908, when it was penned, than it would be now.

A The first question which arises is whether an investment clause in that form is sufficient to oust the rules under the Trustee Act, 1925. At the date of the testator's death the relevant statute was the Trustee Act, 1893; by s. 1 of which

"A trustee may, unless expressly forbidden by the instrument (if any) creating the trust, invest any trust funds in his hands . . . in manner following . . ."

B Then are set out the manner in which he may invest; but he may not do so if expressly forbidden by the instrument. The question is whether the words "but not otherwise" in the testator's will are an express prohibition in the instrument. In the Trustee Act, 1925, s. 1 (1), are slightly different words which **C** have been said in *Re Warren, Public Trustee v. Fletcher* (1) ([1939] 2 All E.R. 599) to have the same effect as those in s. 1 of the Act of 1893. Section 1 (1) of the Act of 1925 provides:

"A trustee may invest any trust funds in his hands . . . in manner following . . ."

D Then the authorised investments are set out; but s. 69 (2) provides that

"The powers conferred by this Act on trustees . . . apply if and so far only as a contrary intention is not expressed in the instrument."

I am, therefore, to take it that "a contrary intention is expressed in the instrument" means that the instrument expressly forbids the investment in question.

E There have been cases on the subject on both sides of the line. First, in *Re Burke, Burke v. Burke* (2) ([1908] 2 Ch. 248), it was said that a certain form of investment, viz., keeping trust estate on deposit, did not expressly forbid investments authorised by the Act of 1893. That seems to me to be a clear case. It might be an implied prohibition, but was not an express one. On the other **F** side of the line is *Re Hill, Fettes v. Hill* (3) ([1914] W.N. 132) where the words were, at the end of a list of investments, "on no other investment whatsoever." EVE, J., felt that he could not get round that, and one is not surprised. It is an express prohibition on investing in any other investment whatsoever.

Here we have something that is neither the one nor the other, and so one must choose on which side of the line to come down. One suggestion made to me is that the words "but not otherwise" only refer to the last words of the **G** clause, "upon real securities in England", and I am invited to say that "but not otherwise" really means "but not elsewhere." Counsel for the fourth defendant ingeniously pointed out that in s. 1 (b) of the then relevant Trustee Act, 1893, are these words: "On real or heritable securities in Great Britain or **H** Ireland." He said that what the draftsman of the will was minded to do was to confine the investment on real securities to England, cutting out those in Ireland (and also, I suppose, cutting out heritable securities in Scotland) and that that is all he meant. That is a very attractive suggestion, but I do not feel able to accept it, because I do not think that "otherwise" means "elsewhere"; nor do I think that to confine the last three words to those immediately **I** antecedent to them is the natural way to construe the clause. What does "not otherwise" mean? It means, in my judgment, "not in any other mode of investment", i.e., no class of investment other than those already stated.

I have some authority for that way of looking at it in an Irish case, *Re Westby* (4) ([1932] I.R. 444), where KENNEDY, C.J., was considering investment clauses in connexion with the 3½ per cent. War Loan and whether that was an authorised investment according to the rules of the then Irish Free State. He says, in the course of his very careful reserved judgment (*ibid.*, at p. 455):

"Even if I had come to the conclusion that the new War Loan, and, for the same reason, Irish Free State National Loan, were not directly authorised by the actual words I have been considering, I should have come to the conclusion that they are not prohibited by the proviso which reads, not (as in some of the precedents) 'in no other investment whatsoever' [as in *Re Hill* (3)] but 'not in any other mode of investment', a prohibition 'express' no doubt as to the modes of investment forbidden, but which, having regard to the generic terms of the investment clause itself, would not in my opinion exclude the particular mode of investment proposed."

I think that the investments are stated generically in the testator's will; and, if one looks at the type of investments authorised, it is quite clear that investment in the stocks of a Dominion is in the same mode as those expressly authorised and not expressly forbidden by the clause. I conclude, therefore, that the prohibition (though it is an express prohibition) does not mean "not in any other investment whatsoever", but "in any other class or mode of investment" and that the securities listed in Mr. Gaul's affidavit under category (C) are within the investment clause. On the other hand, I do not think that any investment (although it comes within the Trustee Act, 1925, s. 1) which is not one of the modes that the testator suggests, is authorised. In other words, the trustees may not, on that view, invest in the full trustee range. For instance, the Essex County five per cent. redeemable stock 1968/1971 in category (D) does not seem to be to me analogous to any of those which he expressly sanctions.

That strictly makes it unnecessary for me to decide the other question, which is this: Suppose the words at the end of the investment clause prohibit any other investment than those actually named, are stocks of Dominions such as Canada and Australia authorised by the words "any British Colony or Dependency"? It is said that DANCKWERTS, J., has decided this question in *Re Brassey's Settlement, Barclays Bank, Ltd. v. Brassey* (5) ([1955] 1 All E.R. 577). That case related to a settlement made in 1936—after, that is to say, the passing of the Statute of Westminster which made the great Dominions independent of the British Parliament except by their consent. Therefore, it was almost inevitable that the learned judge should come to the conclusion that a draftsman who, five years after the Statute of Westminster, referred to a Colony or Dependency, must be taken to mean Colonies or Dependencies as they then were, and that those did not include the self-governing Dominions which were not Colonies or Dependencies any more. I would not seek to throw any doubt on that decision; but it is not quite the same thing here, because in 1908 when this will was penned and in 1909 when this testator died, Canada and Australia—as to the state of Rhodesia I am not sure—were Colonies or Dependencies of the British Crown. Until 1931, therefore, there is no doubt that investments in Canadian and Australian or New Zealand government stocks were undoubtedly within this investment clause, and it seems to me to be a strange thing if a political event like the Statute of Westminster can have, by a side wind, the effect of altering the status of an investment clause (except in exercise of a power to retain, if there be one in the instrument) whereby authorised securities become unauthorised securities which must be realised and investments made in another form. It is also ridiculous to suppose that it was intended that because a Dependency had the added dignity given to it of becoming a Dominion, its stocks should promptly become unauthorised stocks. I should like to be able to avoid that view and to say the time when the clause must be construed is the date when it comes into force, and if at that date the investment in question is authorised, then it continues to be so, because that leaves out of the question the other view, viz., that stocks issued by such a Colony or Dependency afterwards becoming a Dominion would not, although stocks issued before would, be authorised.

- A In *Re Maryon-Wilson's Estate* (6) ([1912] 1 Ch. 55), the Court of Appeal seems to have differed on that, SIR H. COZENS-HARDY, M.R., and FLETCHER MOULTON, L.J., being of the opinion that if a stock had been issued by a Province or the Dominion of Canada when it was a colony, it would not cease to be authorised because the Provinces were all merged in the Dominion and that therefore you must look to the origin of the security. FARWELL, L.J., said that he thought
- B that one must look at the state of things at the time when the investment was made.

- It is not necessary for me to decide between those two views. *Re Westby* (4) put forward a third view, which was that in some ways the term colony or dependency might be regarded as merely a geographical description* and that
- C therefore "Great Britain", for instance, or "the United Kingdom of Great Britain" had the meaning which would ordinarily be given to it and that which was given to it under the Irish Free State treaty of 1921. I am also not going to decide about that; but there is another possibility which attracts me. Under the Colonial Stock Act, 1900, stocks of this type were for the first time brought within the trustee range; the Trustee Act, 1893, had said nothing about them.
- D The Act of 1900 provided that by taking certain steps the then colonies and dependencies could bring their stocks within the range allowed to trustees under the Act of 1893, and for that purpose, in order to guide trustees, the Treasury was to keep a list of any colonial stocks. The stocks of the self-governing Dominions have always been among the colonial stocks on that list, which is still maintained under the Trustee Act, 1925. Indeed the Colonial Stock Act, 1877,
- E s. 26, provides: "The expression 'colony' means any dominion . . ." Therefore, I should have been disposed to say, had it been necessary, that for the purpose of an investment clause a Dominion whose stocks rank in the list kept by the Treasury under the Colonial Stock Act, 1877, could properly be described as a colony or dependency, although politically no doubt it was nothing of the sort.
- F It is unnecessary, however, for me to come to any conclusion on that part of the case; and I decide it on the view which I have expressed concerning the meaning of the words "but not otherwise" at the end of the investment clause.

Declaration accordingly.

Solicitors: *Hancock & Willis* (for the plaintiffs and the second and third defendants); *Church, Adams, Tatham & Co.* (for the fourth defendant).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

* See [1932] I.R. at p. 454.

R. v. McCARTAN.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Donovan and Ashworth, JJ.),
July 28, 1958.]

Criminal Law—Sentence—Probation order—Offender a citizen of Northern Ireland—Whether offender can be required, as term of probation order, to return to Ireland and stay there—Criminal Justice Act, 1948 (11 & 12 Geo. 6 c. 58), s. 3 (1), (2).

Criminal Law—Practice—Irish offender—Power of court to bind over, and make offender's return to Ireland a condition of the recognisance.

There is no jurisdiction under s. 3* of the Criminal Justice Act, 1948, to make it a term of a probation order that the offender shall return to Ireland and remain there.

Where an offender comes from Northern Ireland or Eire and the court is of the opinion that he should be sent back there, the correct practice is to bind him over and to make it a condition of the recognisance that he returns to his own country and does not return to England for such period as the court may think fit.

[As to references to the Court of Criminal Appeal by the Secretary of State, see 10 HALSBURY'S LAWS (3rd Edn.) 523, para. 962.]

For the Criminal Appeal Act, 1907, s. 19 (b), see 5 HALSBURY'S STATUTES (2nd Edn.) 938.

For the Criminal Justice Act, 1948, s. 3 (1) and (2), see 28 HALSBURY'S STATUTES (2nd Edn.) 352.]

Case referred to:

(1) *R. v. Flaherty*, (June 23, 1958), "The Times", June 24.

Reference.

This was a reference by the Home Secretary to the Court of Criminal Appeal under s. 19 (b)† of the Criminal Appeal Act, 1907, for their opinion on the question whether it was regular or possible under the Criminal Justice Act, 1948, to make it a term of a probation order that a probationer should return to Northern Ireland and stay there.

LORD GODDARD, C.J.: In this matter the Secretary of State, under s. 19 (b) of the Criminal Appeal Act, 1907, has referred a question to this court for their opinion. As a rule, when a reference under that paragraph is made, the court consider the matter in private‡ and write to the Home Secretary giving him their opinion, but in this matter, at the request of the Secretary of State, we are

* The terms of s. 3 (1) and (2) of the Act of 1948 are printed at p. 141, letters E and F, post.

† Section 19 of the Act of 1907, as amended by the Criminal Justice Act, 1948, s. 79 and Sch. 9, reads:

"Nothing in this Act shall affect the prerogative of mercy, but the Secretary of State on the consideration of any petition for the exercise of His Majesty's mercy or of any representation made by any other person, having reference to the conviction of a person on indictment or to the sentence (other than sentence of death) passed on a person so convicted, may, if he thinks fit, at any time . . . (b) if he desires the assistance of the Court of Criminal Appeal on any point arising in the case with a view to the determination of the petition, refer that point to the Court of Criminal Appeal for their opinion thereon, and the court shall consider the point so referred and furnish the Secretary of State with their opinion thereon accordingly."

‡ Criminal Appeal Rules, 1908 (S.R. & O. 1908 No. 227), r. 51; 6 HALSBURY'S STATUTORY INSTRUMENTS 64.

A making public the advice we are giving the Home Secretary because it is a matter of some importance for the guidance of courts in the future.

B There has been a considerable number of cases in the last year or two in which young men who are citizens of the Republic of Ireland or of Northern Ireland have come over to this country and committed offences for which, if they were citizens of this country, they would be sent to Borstal. Once or twice, in fact not infrequently, courts here, instead of sending these young Irishmen to Borstal, have taken a course with the object of sending them back to Ireland and seeing that they stay there.

C The particular point which has arisen in the case of one Stephen McCartan, who has petitioned the Home Secretary, is that the judge before whom he was brought made a probation order and made it a term of the probation that he should return to Ireland and stay there. He went to Ireland and then came back and was taken up by the police because he was found drunk and incapable in the street. Having been dealt with for that, he was then brought before a court of assize for a breach of the probation order and received a sentence of twelve months. The Secretary of State raised the question whether it was regular or possible under the Criminal Justice Act, 1948, to make it a term of the probation order that a probationer should return to Ireland and stay there. In the opinion of the court, such an order cannot be made because s. 3 of the Act, which is the section which deals with probation orders, provides, by sub-s. (1), that a probation order can be made requiring the probationer, the subject of the order,

E "... to be under the supervision of a probation officer for a period to be specified in the order of not less than one year nor more than three years."

Section 3 (2) provides:

F "A probation order shall name the petty sessional division in which the offender resides or will reside; and the offender shall (subject to the provisions of Sch. 1 to this Act relating to probationers who change their residence) be required to be under the supervision of a probation officer appointed for or assigned to that division."

G If the attention of the court had been drawn to the provisions of that section, I think that it would have been clear at once that it was not in the power of the courts of this country to make it a term of the probation order that the probationer should go to Ireland and remain there, because he could not be under the supervision of a probation officer; nor is there a petty sessional division in this country which can deal with him if he breaks the probation order. There is no petty sessional division which can be named so that he could be required to be under the supervision of a probation officer appointed for or assigned to that division. If the court has before it one of these young men whom the court thinks should be made to go back to Ireland instead of remaining in this country and the court thinks that this country should not be put to the expense of keeping him at Borstal, the way to do it is to bind him over and make it a condition of the recognisance that he returns to Ireland and does not return to this country for such period as the court may think fit. That was the order which this court made in *R. v. Flaherty* (1) ((1958), "The Times", June 24). In that case I said:

"This boy was convicted at Bow Street under the Vagrancy Act*, as a person loitering with intent, and he was sent to sessions for sentence with a view, I suppose, to his being sent to Borstal, and that was where the learned deputy chairman sent him."

* See Vagrancy Act, 1824, s. 4.

Then I said: "He is just over nineteen", and went through his past history.

A

"He has some petty convictions against him, but it seems to the court that there is really no reason why British taxpayers should have to pay the considerable sum of money it costs to keep boys in Borstal training, and the best thing to do with him is to send him back to Eire."

I then called on the boy and said:

B

"The court is going to bind you over in your own recognisance in the sum of £10 that you accompany an escort to the train, where you will be sent to Eire tonight or as soon as arrangements can be made, and you must not land again in this country for at least three years."

That is an order which, in the opinion of this court, can be made. It must be made in the form of a common law recognisance and not in the form of a probation order. We shall, therefore, inform the Secretary of State that in our opinion this probation order was one which the court had no power to make and the order will have to be quashed. I should say, I think, that in this case the petitioner is a citizen of Northern Ireland, but it is just the same. The probation officers in this country have no duties or powers in Northern Ireland*, though probation orders of this country can apply in Scotland†.

C

D

It is, however, these Irish cases which we are now considering, and we shall advise the Home Secretary that the probation order is bad, which will probably mean that the petitioner will be released. It is only fair to say that the offence was not serious; it was drunkenness. It is also fair to say that he said that he came over here to get in touch with the probation officer, and there is reason to believe that that is true.

E

[Reported by E. COCKBURN MILLAR, *Barrister-at-Law*.]

* Section 82 of the Criminal Justice Act, 1948.

† Section 9 of the Act of 1948, as substituted by the Criminal Justice (Scotland) Act, 1949, s. 77, s. 79 (2), and Sch. 11.

A

R. v. CHAPMAN.

[COURT OF CRIMINAL APPEAL (Devlin, Donovan and Ashworth, JJ.), July 14, 28, 1958.]

Criminal Law—Abduction—Intention to have unlawful sexual intercourse—Meaning of “unlawful”—Sexual Offences Act, 1956 (4 & 5 Eliz. 2 c. 69), s. 19 (1).

B

C. appealed against his conviction under s. 19 (1) of the Sexual Offences Act, 1956, which makes it an offence “for a person to take an unmarried girl under the age of eighteen out of the possession of her parent or guardian against his will, if she is so taken with the intention that she shall have unlawful sexual intercourse with men or with a particular man”. He contended that “unlawful” meant forbidden by law and, since the girl in question was over sixteen, the intended intercourse was not unlawful.

C

Held: “unlawful” in s. 19 meant illicit, viz., outside the bond of marriage. Appeal dismissed.

D

[For the Sexual Offences Act, 1956, s. 19 (1), see 36 HALSBURY'S STATUTES (2nd Edn.) 226; and for the Criminal Law Amendment Act, 1885, s. 7, see 5 HALSBURY'S STATUTES (2nd Edn.) 910.]

Appeal.

This was an appeal by Frank Chapman, who was convicted at Winchester Assizes on Mar. 24, 1958, before STABLE, J., and a jury on an indictment charging him with abduction in that he on Dec. 22, 1955, took an unmarried girl under the age of eighteen out of the possession and against the will of her father with intent that she should have unlawful sexual intercourse with the appellant, contrary to s. 19 (1) of the Sexual Offences Act, 1956. The appeal was against conviction and was on the ground that the intended intercourse was not unlawful, in the sense of being forbidden by law, because the girl was over sixteen and consented. The facts appear in the judgment.

E

I. A. Kennedy for the appellant.

J. H. Inskip for the Crown.

Cur. adv. vult.

July 28. DONOVAN, J., read the judgment of the court: The court has already dismissed this appeal for reasons which we now proceed to give.

G

The appellant was convicted at Winchester Assizes on Mar. 24 last before STABLE, J., of an offence against s. 19 (1) of the Sexual Offences Act, 1956 (hereinafter called “the Act of 1956”) which so far as material reads as follows:

H

“(1) It is an offence, subject to the exception mentioned in this section, for a person to take an unmarried girl under the age of eighteen out of the possession of her parent or guardian against his will, if she is so taken with the intention that she shall have unlawful sexual intercourse with men or with a particular man.”

I

“(2) A person is not guilty of an offence under this section because he takes such a girl out of the possession of her parent or guardian as mentioned above, if he believes her to be of the age of eighteen or over and has reasonable cause for the belief.”

The facts were that the appellant, a married man with four children, in December, 1957, took an unmarried girl, aged sixteen and a few months, away from her parents' house at Southampton to Basingstoke. There they stayed at his sister's house, slept together and had intercourse. He then took her to Winchester to the house of another of his sisters to whom he introduced her as his wife. From Winchester the girl was taken back home by the police. He pleaded not guilty to the charge under s. 19, but was convicted by the jury and sentenced to eighteen months' imprisonment. On June 30 last the court gave

leave to appeal solely for the purpose of enabling the appellant to argue a point of law which he took unsuccessfully before the trial judge, namely, whether the intended intercourse in this case could properly be described as "unlawful" as s. 19 requires. The appellant's main contention is that that word connotes intercourse which is forbidden by law, and since the girl was over sixteen it was not so forbidden in this case, however immoral it was. Alternatively, he says that the section applies only if the girl is taken away for intercourse in circumstances such as would constitute the breach of a covenant in a lease not to create a nuisance, for example, to a house used as a brothel.

It is curious that the point has not apparently arisen before, because the Act of 1956 is a consolidating measure, and there is a long history behind many of its provisions, though not so long behind s. 19 itself. The researches of counsel for the appellant have revealed that in the reign of Philip and Mary, for example, a statute was passed making it an offence to take an unmarried girl under the age of sixteen out of the possession and custody and against the will of the father (4 & 5 Phil. & Mar. c. 8, s. 3). No particular intent, however, was specified as an ingredient of the offence. By the statute 18 Eliz. 1 c. 7, s. 4, it was enacted that if any person should unlawfully and carnally know any woman-child under the age of ten, it should be felony. It is difficult to suppose that "unlawfully" in this context meant contrary to some positive enactment. One would think that all intercourse with a child under ten would be unlawful; and on that footing the word would be mere surplusage. The same expression was used when this section was re-enacted in 1828 by 9 Geo. 4 c. 31, s. 17. When one comes to the Offences against the Person Act, 1861, one finds s. 49 making it an offence to have "illicit" carnal connexion with a woman or girl under twenty-one, if procured by false pretences or fraud; and s. 50 re-enacting that it shall be an offence unlawfully to have carnal knowledge of a girl under ten. The precursor of s. 19 of the Act of 1956 is, however, s. 7 of the Criminal Law Amendment Act, 1885, which provided that a person committed an offence who took an unmarried girl under eighteen out of the possession and against the will of her parents with the intent that she should be "unlawfully and carnally known" by any particular man or generally. This is now in substance re-enacted in s. 19 of the Act of 1956. No great assistance is to be derived for present purposes from the language used in these earlier statutes, except that it does suggest that the word "unlawfully" in relation to carnal knowledge has not been used with any degree of precision. It would be natural, however, for the framers of a statute in days when the canon law would be more in their minds than today, to refer to any intercourse outside the bond of matrimony as "unlawful"; and for their successors when drafting consolidating Acts simply to repeat the word without a close consideration of its necessity or precise meaning.

We reject the argument that in s. 19 of the Act of 1956 the word "unlawful" connotes intercourse contrary to some positive enactment. The argument at once prompts the question why, if the intercourse in question is already positively forbidden, s. 19 should do it again. The answer suggested on behalf of the appellant is that under s. 19 the law can step in before unlawful intercourse actually occurs and so prevent the mischief. This is perhaps a little imaginative when one considers the circumstances of most abductions; but the answer seems to us to be this: the plain purpose of s. 19 is to protect young unmarried girls. That protection would be largely, if not wholly, illusory if in every case it were incumbent on the prosecution to prove that she was taken from her parents for the purpose of intercourse of a kind positively forbidden by some enactment, and not for intercourse not so forbidden. We do not think that such can have been Parliament's intention.

As regards the alternative suggestion that "unlawful" intercourse in s. 19 connotes intercourse in a brothel or something of that kind, it is sufficient to observe that to procure a girl to leave her home to become an inmate of or to

A frequent a brothel, or to become a common prostitute, is made a specific offence by s. 22 of the Act of 1956, and s. 19 is not therefore needed for this purpose.

If the two interpretations suggested for the appellant are rejected, as we think that they must be, then the word "unlawful" in s. 19 is either surplusage or means "illicit". We do not think it is surplusage, because otherwise a man who took such a girl out of her parents' possession against their will with the honest
B and bona fide intention of marrying her might have no defence, even if he carried out that intention. In our view the word simply means "illicit", i.e., outside the bond of marriage. In other words, we take the same view as the learned trial judge. We think this interpretation accords with the common sense of the matter, and with what we think was the obvious intention of Parliament. It is also reinforced by the alternatives specifically mentioned in s. 17 and s. 18 of
C the Act of 1956, i.e., "with the intention that she shall marry or have unlawful sexual intercourse . . ."

There was ample evidence in the present case on which the jury could find that this girl was taken away by the appellant with the intent that he should have intercourse with her which was unlawful in the sense we have determined. As
D leave to appeal was given, however, to argue the point of law involved, the sentence will run from the date of conviction.

Appeal dismissed.

Solicitors: *Registrar, Court of Criminal Appeal* (for the appellant); *Town clerk, Southampton* (for the Crown).

[*Reported by E. COCKBURN MILLAR, Barrister-at-Law.*]

E

NOTE.

F

WHITTINGHAM v. NATTRASS.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Donovan and Ashworth, JJ.), July 28, 29, 1958.]

Case Stated—Case stated out of time—Case not lodged in Crown Office within
G time prescribed—Notice of appeal not served within time prescribed—*Necessity of applying to court to extend time—Magistrates' Courts Rules, 1952 (S.J. 1952 No. 2190), r. 63—R.S.C., Ord. 59, r. 33.*

[As to limitation of time in stating a case, see 25 HALSBURY'S LAWS (3rd Edn.) 253, para. 474.]

H Case referred to:

- (1) *Ripington v. Hicks & Son (Oxford), Ltd.*, [1949] 1 All E.R. 239; 113 J.P. 121; 2nd Digest Supp.

Case Stated.

This was a Case Stated by justices for the county of Leicester, acting in and for the petty sessional division of Leicester, in respect of their adjudication as a
I magistrates' court sitting at the Castle in the City of Leicester. The justices heard informations against the appellant on Jan. 22 and Jan. 27, 1958. They stated the Case on May 8, 1958. During the hearing before the Divisional Court, it appeared (a) that no application had been made to the court to extend the statutory time limit (three months) within which the Case should have been stated, but was not, and (b) that the appellant had purported to extend the times, laid down in R.S.C., Ord. 59, r. 33 (ten days and fourteen days respectively), within which a Case Stated must be lodged, after having been received, and within which notice of appeal must be served on the respondent, by obtaining

and filing a consent order in the Crown Office in accordance with a statement in the notes to r. 33 as set out in the ANNUAL PRACTICE. The case is reported on the directions given by LORD GODDARD, C.J., on these matters. A

R. H. Tuck for the appellant.

R. B. C. Parnall for the respondent.

LORD GODDARD, C.J.: Since the court rose yesterday evening we have had an opportunity of looking into this matter, and the position is this: In the first place, if magistrates do not state the Case within the statutory time*, viz., within three months of the application therefor, the court has power to extend the time†, but an application to extend the time must be made and reasons must be shown why the court should extend the time because if the failure of the magistrates is due to the fault of the applicant the court will not as a rule extend the time. No application was made in this case to extend the time. B

Secondly, the matter was not set down within ten days after receiving the Case; the Case was not lodged at the Crown Office, and the Rules of the Supreme Court provide that it shall be lodged within the ten days, and that within fourteen days after receiving the Case a notice of appeal is to be served on the respondent‡. Those dates were ignored. There is a statement in the ANNUAL PRACTICE that that can be remedied by a consent order being filed in the Crown Office§, but the court knows of no authority for that. Consents cannot be filed to set aside the Rules of Court in that way. The court has power to extend the time if proper grounds are shown but an application must be made to the court to extend the time. It cannot be done by consents filed in the Crown Office. We could have extended the time for the magistrates to state the Case. That has been done and no objection has been taken by the other side about that. We can extend the time for lodging the Case. An affidavit ought to have been filed explaining the delay and asking the court to exercise its power. The court will exercise the power, but I hope that in future it will be understood that consents cannot be filed to set aside the Rules of Court. It is most important for the reasons given in *Rippington v. Hicks & Son (Oxford), Ltd.* (1) ([1949] 1 All E.R. 239) that these Cases from magistrates should come on promptly and should not be delayed in this way. If extension of time is desired application should be made to the court; time cannot be extended by consent. C

Solicitors: *Lincoln & Lincoln* (for the appellant); *James & Charles Dodd*, agents for *Josiah Hincks & Son*, Leicester (for the respondent). D

[Reported by WENDY SHOCKETT, Barrister-at-Law.] E

* See r. 63 of the Magistrates' Courts Rules, 1952 (S.I. 1952 No. 2190) (13 HALSBURY'S STATUTORY INSTRUMENTS 68). By s. 87 (2) of the Magistrates' Courts Act, 1952 (32 HALSBURY'S STATUTES (2nd Edn.) 489) application for statement of a case must be made within fourteen days of the date of the magistrates' decision; see also the notes to s. 87, *ibid.*, at p. 490.

† See *Moore v. Hewitt*, [1947] 2 All E.R. 270.

‡ See R.S.C., Ord. 59, r. 33 (ANNUAL PRACTICE (1957) 1378).

§ See ANNUAL PRACTICE (1958), notes to Ord. 59, r. 33 at p. 1749. F

A

BAKER AND ANOTHER v. T. E. HOPKINS AND SON, LTD.

[QUEEN'S BENCH DIVISION (Barry, J.), July 14, 15, 16, 17, 18, 21, 1958.]

Negligence—Rescue—Negligence placing workmen in imminent peril from gas on their descending a well—Doctor descending well to rescue them—Whether duty of care owed by master to servant extended to doctor.

B

Safe System of Working—Safe place of work—Well—Clearing well of water by using petrol pump on platform down well—Danger from carbon monoxide—Liability of master to servants and to doctor attempting their rescue.

Fatal Accident—Damages—Assessment—Deductions from damages—Contract of insurance—Estate duty—Whether proportion of estate duty attributable to policy moneys should be excluded from deduction—Fatal Accidents (Damages) Act, 1908 (8 Edw. 7 c. 7), s. 1.

C

A company, which carried on business as builders and contractors, undertook work on a well which involved clearing it of water. The well was some fifty feet deep and about six feet in diameter. H., a director of the company, and two workmen employed by it, erected a platform twenty-nine feet down the well and some nine feet above the water and lowered on to it a petrol-driven pump. After this engine had worked for about one and a half hours it stopped and a haze of fumes was visible in the well. On the following morning H. instructed the two workmen to go to the well, but told them not to go down the well until he came. The workmen arrived at the well at about 8.15 a.m., and, before H. had arrived, one of the workmen went down the well and a few minutes later the other workman also went down it. Both were overcome by fumes. A doctor, who had been called to the well, went down the well with a rope tied to his body in order to see if he could help the men, though he had been warned not to go. He also was overcome by fumes. Endeavour was made to haul him to the surface by the rope, but the rope caught in a down pipe in the well and he could not be brought to the surface until help arrived some time later. He died shortly afterwards. His executors brought an action for damages under the Fatal Accidents Acts, 1846 to 1908, and the Law Reform (Miscellaneous Provisions) Act, 1934, against the company. His estate included insurance policies for £15,378, and the amount of estate duty payable on his estate (the value of which was £36,837) was £8,897.

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Held: (i) the company was liable to the plaintiffs for negligence causing the death of the doctor for the following reasons—

(a) in breach of the duty owed by a master to his servant the company had exposed its workmen to unnecessary risk, the orders given by H. against going down the well not having been sufficiently urgent and precise to absolve the company from responsibility for the workmen's descent, and

H

(b) the company's duty of care extended to the doctor, who was endeavouring to rescue the two workmen whom the company had placed in imminent peril, it being immaterial that the company's duty of care towards the workmen rose out of the personal relationship of master and servant, and

I

(c) the doctor had not acted in a foolhardy or unreasonable way, and the mischance of the rope being caught did not absolve the company from responsibility for his death.

Haynes v. Harwood ([1934] All E.R. Rep. 103) applied.

(ii) in assessing damages the notional deduction to be made from the doctor's estate for estate duty should not be reduced by the portion of that duty which was attributable to the £15,378 policy moneys which, by reason of s. 1 of the Fatal Accidents (Damages) Act, 1908, were not to be taken into account (see p. 154, letter C, post).

Per CURIAM: if by his own carelessness a man puts himself into a position of peril of a kind that invites rescue, he would in law be liable for any injury caused to someone whom he ought to have foreseen would attempt to come to his aid (see p. 153, letter H, post).

Dupuis v. New Regina Trading Co., Ltd. ([1943] 2 W.W.R. 593) doubted.

[As to a master's duty not to expose his servant to unnecessary risk, see 25 HALSBURY'S LAWS (2nd Edn.) pp. 508 *et seq.*; as to human intervention breaking the chain of causation of damage, see 11 HALSBURY'S LAWS (3rd Edn.) 283, para. 467, and as to imminent danger justifying an unusual course of action, so as not to amount to contributory negligence, see 23 HALSBURY'S LAWS (2nd Edn.) 688, para. 971.]

As to the intervention of a third party and the chain of causation in negligence, see 23 HALSBURY'S LAWS (2nd Edn.) 594, 595, para. 845; and for cases on the subject, see 36 DIGEST (Repl.) 33, 34, 150-157, and 151, 794, 795.]

Cases referred to:

- (1) *Haynes v. Harwood*, [1934] All E.R. Rep. 103; [1935] 1 K.B. 146; 104 L.J.K.B. 63; 152 L.T. 121; 36 Digest (Repl.) 151, 795.
- (2) *Dupuis v. New Regina Trading Co., Ltd.*, [1943] 2 W.W.R. 593; 2nd Digest Supp.

Action.

In this action Mrs. Ailsa Battie Baker, widow of Dr. Mark Gregory Baker, and Mr. Geoffrey Murkett, as executors of Dr. Baker, claimed damages against the defendant company, T. E. Hopkins & Son, Ltd., under the Fatal Accidents Acts, 1846 to 1908, and the Law Reform (Miscellaneous Provisions) Act, 1934, for negligently causing the death of Dr. Baker.

The defendant company, which carried on business as builders and contractors, had arranged to clean out a well at Tadser Farm, Tickwell. The well was fifty feet deep and approximately six feet in diameter. Before it could be cleaned, it had to be emptied of about twelve feet of water and the managing director of the defendant company, a Mr. Hopkins, decided to use a petrol-driven pump for this purpose. He had little experience of the work of cleaning out a well, had never used the pump for this purpose before and was ignorant of the difficulties and dangers which its use might involve. On Aug. 13, 1955, Mr. Hopkins, having arrived at the well with the petrol pump on a lorry and certain other equipment, including ladders, planks and rope, lowered a lighted candle in a bucket to the bottom of the well in order to test the atmosphere. On being brought to the surface the candle was still alight. Expert evidence established that this test, while perfectly satisfactory in detecting certain natural gases (whose presence in dangerous concentrations would cause the candle to go out) was virtually useless for detecting carbon monoxide. A lethal concentration of carbon monoxide could be present without being discovered by such a test. Mr. Hopkins then himself descended the well by ladder in order to inspect the walls and timber, and he and two workmen employed by the defendant company erected a platform twenty-nine feet below ground level and about nine feet above the level of the water. They placed a twenty-five foot ladder on the platform with its top resting on the wall of the well, and at an angle to this ladder was a shorter ladder resting on a cross-member of the well and reaching to its top. They then lowered the petrol-driven pump onto the platform. On Aug. 16, 1955, Mr. Hopkins and the two workmen returned to the farm and, the atmosphere having been tested again by means of the candle in the bucket, one of the workmen went down to the platform to start the engine. The tank of the petrol engine was full and its contents, approximately one gallon, were sufficient to run the motor for about six hours. When the engine was working regularly the workman returned to the surface and remarked to Mr. Hopkins that one could not stay down there long as the fumes would kill one. To this Mr. Hopkins replied that that was how people committed suicide in motor cars. About a quarter of an hour later a

A friend of Mr. Hopkins came to the well, and lowered a candle tied to the end of a rope into the well. The candle went out when it was fifteen feet down the well. Before leaving the farm Mr. Hopkins said to one of the workmen "Don't go down the well tomorrow until these fumes have cleared." To this the workman assented. The workmen remained at the farm for some time after Mr. Hopkins had left. When they were about to leave the engine stopped, having run for
B about one and a half hours. Later that evening Mr. Hopkins returned to the farm. He found that the engine had stopped and on inspecting the well he found that it was filled with a blue haze and smelt of fumes. He decided that it was too dangerous to go down. He left the manhole cover off and placed a third ladder over the aperture.

C At about 7.30 a.m. on Aug. 17, the two workmen met Mr. Hopkins in the company's yard. Mr. Hopkins gave them their orders and added that they were not to go down the well at Tadser Farm until he got there. The workmen arrived at the farm at about 8.15 a.m. Mr. Hopkins would not have got to the farm until sometime after 10 a.m., as he had a prior appointment in the neighbouring town. The workmen, on their arrival, tested the depth of water in the well. A few minutes later a Miss Insley, who was staying at the farm with her father and was a
D qualified nurse, heard one of the workmen call out "Bill, are you all right?" Miss Insley's brother-in-law, a Mr. Taylor, went to the well where a workman told him that his mate was down the well and that he thought he was ill. Mr. Taylor told the workman that he would go for help and that the workman was not to go down the well for his mate. Mr. Taylor caused a telephone message to be sent from a neighbouring farm for a doctor, and to the police, and to Mr.
E Hopkins. Within two or three minutes Miss Insley went to the well but neither of the workmen were to be seen. She looked down the well and saw that the second workman was also down the well and that he had fallen down the ladder on to the platform. At 8.45 Mr. Taylor returned with a neighbouring farmer and left again to summon a fire brigade equipped with breathing apparatus. At about that time Dr. Baker arrived, having been summoned by telephone.

F Miss Insley told him that she feared that the two workmen had been overcome by poisonous gas in the depths of the well and that the previous evening the engine of the pump had been running and emitting fumes. She asked him not to go down the well because the fire brigade was coming. Dr. Baker replied that there were two men down there and that he must see what he could do for them. He tied a rope round his waist and asked Miss Insley and her sister, who had
G joined her there, to hold the rope, and said that if he did not feel well he could tell them and they could pull him up. He then, at about 8.50 a.m., started to climb down the first of the two ladders leading to the platform, and as he went down Miss Insley repeatedly called to him "Are you all right?" and he replied "Yes". He got to the bottom of the first ladder and moved as though he were going to cross on to the second ladder, so as to reach the platform. At the same time he
H said that there was nothing he could do for the men and that he was coming up in a minute. He appeared to bend down still further towards the bottom of the well and in answer to Miss Insley's question whether he was all right again replied "Yes". Immediately afterwards there was a sound and he appeared to slump off the ladder and his full weight came on the rope. Miss Insley and her sister, together with a man who had arrived in the meantime began to pull on the
I rope and raised Dr. Baker several feet. By mischance the rope then became fast and they could move it no further. All this time they were calling out for help.

At about 9.5 a.m. the police arrived. A police sergeant tried to go down the well to release the rope, but when he had gone so far that his head was below the surface of the ground he found that the fumes made it impossible for him to go further and he had to abandon the attempt. Other people arrived on the scene and at 9.20 a.m. a fire brigade equipped with breathing apparatus arrived and Dr. Baker was brought to the surface. The rope supporting him was found to

have been caught round the down pipe which ran some twelve to eighteen inches from the side of the well. Dr. Baker was unconscious and he died before he reached hospital. Subsequently the bodies of the two workmen, both of whom were dead, were recovered from the well. A

In regard to the question of damages the following were the facts. Dr. Baker was forty-one at the time of his death and his widow was about the same age. There were two children of their marriage, a boy of twelve and a girl of ten. The widow was herself a qualified doctor and Dr. Baker and she had been practising in partnership for some four years before his death, he having four-fifths and she one-fifth of the profits. Dr. Baker had very many health service patients, but his widow had only few on her own panel, her time being largely occupied at hospital and in giving anaesthetics there. The net annual gain accruing to the family from Dr. Baker's earnings was probably somewhat more than £1,000 yearly. Dr. Baker left personal estate amounting to £36,827 gross. From this total certain deductions had to be made. Out of the total the amount of insurance payments arising from policies that Dr. Baker had taken out during his life amounted to £15,370. Under the terms of the Fatal Accidents (Damages) Act, 1908, that sum had to be disregarded in assessing any substantial benefits accruing to the widow and family. Some £8,897 had been paid for estate duty. The value of the matrimonial home and furniture was £2,725 which had also to be excluded in estimating gain accruing to the widow as a result of the death. Other items of his estate which were relevant to the assessment of damages were a sum of £8,236 of government stock, £1,488 in a trustee savings bank and two reversions the value of which was £629, making in all a total of £10,353. Under Dr. Baker's will his widow was his sole beneficiary and there was little reason to suppose that anyone other than his wife and possibly, later, his children would have benefited from his estate. The amount of the medical practice gratuity paid by the Ministry of Health on Dr. Baker's death was £5,540 and the amount of his death gratuity under the health service scheme was £3,592. B

F. W. Beney, Q.C., and *D. G. A. Lowe* for the plaintiffs, the personal representatives of Dr. Baker. C

Marven Everett, Q.C. and *Tudor Evans* for the defendant company. D

BARRY, J., after stating the facts, continued: On these unhappy facts, about which there is virtually no dispute, counsel for the plaintiffs contends that the plaintiffs are entitled to recover damages from the defendant company for the loss sustained as a result of Dr. Baker's death. Shortly stated, he based his claim on the following grounds: first he submitted that Mr. Hopkins, and through him the defendant company, was guilty of negligence towards his two workmen, who met their deaths in the well. Secondly, under the principles enunciated by the Court of Appeal in the very well-known case of *Haynes v. Harwood* (1) ([1934] All E.R. Rep. 103) the defendants also owed a duty of care to Dr. Baker as a person who went to the rescue of these two men who had been placed by the defendant company's negligence in a position of imminent peril and whose lives were obviously in danger. E

As an alternative method of establishing the liability of the defendants, he submitted that even if no personal negligence on the part of Mr. Hopkins or his company were established by the evidence, the defendants were none the less liable because on this assumption one or both of the workmen had placed themselves, owing to breach of the instructions given to them, in a position of imminent danger, and would themselves have been liable to anyone, including Dr. Baker, who came to their rescue. As one or both of the workmen committed this negligent act in the course of their employment, so counsel for the plaintiffs submits, he contends that the defendant company is vicariously responsible for its consequences. F

Apart from the two warnings, or orders not to go down the well, which were undoubtedly given by Mr. Hopkins to his two workmen, there can I think be no G

A doubt of any kind that the defendant company was guilty of almost every possible breach of the duties which as employer it owed to its servants.

On undisputed expert evidence and indeed by every normal standard of common sense the system of work adopted by the defendant company was highly dangerous to its employees—and, in fairness let it be said, to Mr. Hopkins himself. Even a small 98 c.c. petrol motor, working some twenty-nine feet down this well, would very soon poison the air, and after running for as long as one and a half hours would produce a very powerful lethal mixture containing a high proportion of carbon monoxide in the lower parts of the well. This fact is so obvious that it is unnecessary for me to refer in detail to the technical evidence. Moreover, this lethal mixture would not be dispersed for many days—or maybe weeks. Owing to the low temperature and complete lack of turbulence in the lower levels of the well, there would be no tendency for the poisonous gases to rise, and the opportunity for their diffusion was extremely limited. Mr. Hopkins was ignorant of these facts, nor did he seek information or advice before he installed the engine on its platform and instructed his workmen to start it. In the nature of things, if the well was not completely emptied by the use of the one gallon which its tank contained, someone would have to go down the well to refill and restart the engine. Alternatively someone might have had to go down to stop it when the well was empty or to adjust it while it was running. Moreover when the water had been cleared, someone had to go down to the bottom of the well to clean it, and whoever had done any of these things would almost inevitably have met his death. Mr. Hopkins was not aware of, nor did he seek advice as to, the well-known tests for the presence of carbon monoxide, and he embarked on the whole enterprise with almost complete disregard to its danger. Clearly a petrol engine should never have been used nearly thirty feet down this well, except perhaps with an elaborate system of ventilation.

The law exacts from employers a high standard of care; ignorance and inexperience which result in the creation of unnecessary risk, cannot, in law, provide an excuse for departure from that standard. The defendant company failed to comply with their duty to their two employees and unless it can be said that the sole cause of this accident was the disregard by these two men of the orders given to them not to go down the well, the company's liability to them is not in doubt.

The case put by counsel for the defendant company was that, whatever Mr. Hopkins' earlier mistakes, he saw the light in time and effectively put matters right by the instructions which he gave to one of the workmen on the Tuesday evening and to both the two men early on Wednesday morning; and that after these instructions had been given, the workmen were solely responsible for the disaster which overtook them. Counsel for the defendant company asked the rhetorical question: "What more could Mr. Hopkins do than to tell them not to go down the well?"

Attractive though this argument may sound, I think that it requires somewhat careful examination. It is necessary to look at the wording of the orders, and the circumstances in which they were given. What was said to the workmen on Tuesday night, clearly implied, as I think, that there was at least a good chance that the fumes would have cleared by the following morning, if not at the time when the workmen arrived, then at any rate shortly afterwards. Why, otherwise, should the two men be sent to the farm? The only possible object in sending them there was either to restart the engine if it had stopped or to clean the bottom of the well if all the water had been cleared. Again, one is bound to ask how were they to tell whether or not the fumes had in fact cleared—and above all how were they to tell whether a rapidly fatal concentration of carbon monoxide did or did not remain in the lower portion of the well? Although he did not mention it to the coroner, Mr. Hopkins, somewhat as an afterthought, told me that he had already told one of them to make the candle test before they ever went down the

well. If such an instruction was ever given, which I am bound to say that I doubt, it was not repeated on Tuesday evening, when Mr. Hopkins was already beginning to apprehend the danger. Even if it had been repeated, the candle test might well have been useless. Then on Wednesday morning Mr. Hopkins said: "Don't go down the bloody well until I get there". As the only reason why they were being sent to the farm was to work in the well, an instruction of that kind surely implied that after Mr. Hopkins' arrival they were at least likely to be able to go down. As to the circumstances in which the order was given on the Wednesday morning, I was much impressed by the argument made by counsel on behalf of the widow of one of the workmen in the other action*, which was considered at the same time as the present one, as to the very considerable likelihood of misunderstanding. Neither of the workmen were aware that Mr. Hopkins had visited the farm after they had left on the previous evening. For all they knew he might have thought that the pump had run for the full six hours and had emptied the well. No one seems to have ascertained what was in the minds of these two unfortunate men, but they may well have thought that his order "not to go down" related to the clearing of the bottom of the well, which he may have wished to supervise. If that was their state of mind they may well have thought that, without disobeying the spirit of the orders given to them, they would be doing a service to their employers by restarting the engine and emptying the well before Mr. Hopkins arrived. Indeed, for all we know, one of the workmen may have gone down the well to see if the "fumes had cleared", so as to be able to report to Mr. Hopkins on his arrival rather than wait for an indefinite period wasting his employers' time.

Taking all these factors into account, I am quite satisfied that the orders given by Mr. Hopkins to the two workmen were insufficiently precise and urgent to absolve the defendant company from blame. If, for example, a farmer brings into a shed in his yard a man-eating tiger or a bull which is so savage that it attacks every human creature that approaches it, it is surely insufficient for him to say to his men: "Don't go into the shed unless it looks friendly", which was in effect the real result of Mr. Hopkins' instruction to the workman on the Tuesday evening, or "Don't go in until I come". Both of these orders imply that when the animal looks quiet or when the farmer is present it is safe to go in. In my view the appropriate order, in such circumstances, must be: "Don't go into that shed because if you, or I, or anyone else does so it means certain death". For these reasons I am satisfied that the defendant company was negligent towards their two employees.

As an alternative line of defence counsel for the defendant company sought to persuade me that the duty owed by an employer to his workmen, being personal to them, left no room for the "rescuer", and that the *Haynes v. Harwood* (1) doctrine had no application when the act of negligence which caused the peril arose out of the relationship of master and servant. No authority could be cited in support of this proposition and I am satisfied that it is unsound. The original premise is no doubt correct. On a similar principle, the motorist driving along the highway does not owe a duty of care to the world at large, but only to those whom he might reasonably contemplate would be affected by his negligence. The essence of the *Haynes v. Harwood* (1) doctrine, as I understand it, is that among the persons who fall within that class, are those who might attempt to rescue the man or woman placed in acute peril by the negligent act complained of. Whether that act of negligence arises out of the relationship between master and servant, or any other relationship which involves a duty of care, seems to me to be quite immaterial.

It was not disputed that a doctor summoned to the scene of a disaster such as this one, would in normal circumstances qualify as a "rescuer". While, however,

* *Ward v. T. E. Hopkins and Son, Ltd.* (July 21, 1958) unreported. An action brought by the widow of one of the deceased workmen.

A paying very proper and very generous tribute to the bravery of the late Dr. Baker, counsel for the defendant company, as it was his duty to do, also challenged the reasonableness of his conduct. Indeed, as I ventured to put it during the course of the argument, he suggested that he was "unreasonably brave" and that his conduct broke the chain of causation by amounting to a "novus actus interveniens"—or at least that the defendant company can escape liability under the maxim "volenti non fit injuria" or in other words that he voluntarily accepted the risk.

In my judgment neither of these submissions can succeed, having regard to the evidence in the present case. It is beyond question that the late Dr. Baker acted as he did in an urgent and passionate desire to do everything that he could, even at great risk to himself, to preserve human life. It would be an insult to the profession to which he belonged if I were to hold that such conduct, on the part of a brave and humane doctor, could not be reasonably anticipated by those whose negligent acts created the peril which he sought to avert. It is clear that Dr. Baker was fully alive to the risks, but I can find no evidence to suggest that he voluntarily undertook to accept all the consequences of the defendants' negligence; nor do I think that he acted in a foolhardy or unreasonable way. Despite the emergency, he arranged for himself to be roped, and, had it not been for the quite unforeseeable mischance of the rope becoming caught in the down pipe or cross members of the well, he might easily have been hauled to the surface and his life saved. The defendant company, whose negligence brought about the danger, must, however, accept the risk of mischances of this kind.

On these findings the plaintiffs are entitled to recover and it is unnecessary for me to deal at any length with the very difficult legal problems which arise under counsel for the plaintiffs' alternative submission based on the assumption that one of the two workmen or both were wholly to blame. To succeed on this ground the plaintiffs would have to show that one or other or both of them, in going down the well, was or were acting in the course of his or their employment, although contrary to express instructions, and that in consequence the defendant company was responsible for any tortious act which he or they might commit. Secondly, it would be necessary for them to establish that one or other or both of them owed a duty to their rescuer, Dr. Baker, for the neglect of which they have been liable to him in damages. I have little doubt that the two men were acting within the scope and in the course of their employment. They were sent to the farm to work in the well and the orders which they received regulated only the manner and time in and at which they should carry out this work. The second element involves a difficult and fundamental problem which, in this country at least, is devoid of authority, namely whether a right of action arises at the suit of the "rescuer" when the negligent act is committed by the person whom he attempts to rescue. Were I called on to decide it, I should, with some hesitation and doubt have taken this view:—Although no one owes a duty to anyone else to preserve his own safety, yet if, by his own carelessness a man puts himself into a position of peril of a kind that invites rescue, he would in law be liable for any injury caused to someone whom he ought to have foreseen would attempt to come to his aid.

In expressing this opinion I am aware that it is contrary to the view taken by the Canadian court in *Dupuis v. New Regina Trading Co., Ltd.* (2) ([1943] 2 W.W.R. 593). On reading the judgment in that case I am not wholly satisfied that the point was presented to the court in quite the same way as it was presented to me by counsel for the plaintiffs. Be that as it may, that Canadian decision, although of course entitled to the greatest respect, is in no sense binding on the courts of this country.]

I must now turn to the last but not the least difficult problem which this case presents, namely the damages which ought to be awarded to the widow and the family of Dr. Baker. [His LORDSHIP considered the relevant facts, briefly summarised at p. 150, letters A to E, ante, and continued:]

An interesting argument was addressed to me by counsel for the defendant company in relation to the insurance moneys amounting to £15,378, and their effect on the total estate duty payable to the revenue. The effect of this submission was that the widow should be regarded as benefiting by the amount of the estate less the insurance moneys and less only such portion of the total estate duty as was attributable to that part of the estate other than the £15,378 received under the insurance policies. This somewhat interesting point was discussed at length in Mr. KEMP's work on the QUANTUM OF DAMAGES in fatal injury claims, and I do not think that at this stage it would be helpful for me to deal with it in any detail. It is sufficient for me to say that I agree with the views expressed at pp. 15 to 17 of that work, and I think that it would be infringing the real meaning of the provisions of the Fatal Accidents (Damages) Act, 1908, if I were to deal with death duties or estate duties in that way. The estate duty is a debt; and it is a debt against the estate as a whole. I do not think that it is possible, as I say, without infringing the provisions of the Fatal Accidents (Damages) Act, 1908, to subdivide it and treat some part of that sum of £8,897* as being attributable and payable out of the insurance moneys and the balance as being attributable to and being payable out of the remainder of the estate. [HIS LORDSHIP then referred to the other items stated at p. 150, letters D and E, ante, and said that, having tried to take all factors into account and without attempting a calculation of mathematical precision, he had concluded that a sum of £12,000 damages should be awarded. HIS LORDSHIP continued:]

Before I leave this case, it is right, I think, for me to say this. I have indicated that in my judgment the defendant company is in law clearly to blame for the death of these three men, and it is to blame because ignorance, lack of thought and lack of experience do not provide employers with an excuse for subjecting their men to unnecessary risks. That is the law, and this court is concerned only with the law. Very different considerations apply in relation to moral responsibility. I am satisfied that Mr. Hopkins is a very decent and a very truthful man; I am quite satisfied that this disaster occurred wholly through his lack of experience and ignorance. Many better men than he have tried to undertake tasks which were beyond them, and I think that it would be wrong for him to go through his life weighed down by the thought that he was under a moral responsibility, as opposed to a clear legal responsibility, for the death of these three people.

Judgment for the plaintiffs.

Solicitors: *Hempsons* (for the plaintiffs); *Gregory, Rowcliffe & Co.*, agents for *Fishers, Ashby-de-la-Zouch* (for the defendant company).

[*Reported by E. COCKBURN MILLAR, Barrister-at-Law.*]

* I.e., the amount of the estate duty on the deceased's estate, see p. 150, letter D, ante.

A JEFFREY v. KENT COUNTY COUNCIL.

[QUEEN'S BENCH DIVISION (Paull, J.), July 22, 1958.]

Fatal Accident—Compromise—Validity—Administratrix, deceased's widow, agreeing lump sum to cover her loss and that of her and the deceased's infant children—Apportionment of lump sum also agreed—After writ issued, stay of action sought by administratrix on terms that defendants pay into court the lump sum apportioned as originally agreed—Refusal by master to approve administratrix' portion of lump sum—Whether master entitled to refuse approval.

The defendants, being responsible for the death of one J., offered to pay to his widow, before a writ was issued by her, a lump sum of £4,350 of which £3,650 was to be in respect of the widow's loss from J.'s death, £300 in respect of J.'s son's loss and £400 in respect of J.'s daughter's loss; both the son and the daughter were infants. The widow having agreed to accept the lump sum, then, as administratrix of J.'s estate, issued a writ against the defendants and, by her statement of claim, claimed damages under the Fatal Accidents Acts, 1846 to 1908, for the benefit of herself and her son and daughter, and under the Law Reform (Miscellaneous Provisions) Act, 1934. Before delivery of a defence, the widow took out a summons asking that the action be stayed on terms which included payment into court by the defendants, in satisfaction of the claim against them under the Fatal Accidents Acts, of the lump sum of £4,350, to be apportioned as originally agreed between the widow and the defendants. The master before whom the summons came was not satisfied of the adequacy of any of the apportioned sums, viz., the widow's £3,650, the son's £300 and the daughter's £400, and the defendants, while agreeing to increase the sums to be paid to the son and daughter to £450 and £550 respectively, contended that the master had no jurisdiction to refuse to approve the widow's portion of the lump sum, which she had agreed to accept. On appeal by the defendants from the master's refusal to approve a settlement of the action on terms which included payment to the widow of the sum of £3,650,

Held: the master was entitled to refuse to approve the settlement of the widow's portion of the lump sum as being £3,650, because the agreement by her to settle the claims of all dependants for £4,350 bound no one for the following reasons—

(i) a claim by an administratrix under the Fatal Accidents Acts, 1846 to 1908, on behalf of herself and other dependants of the deceased was the claim of each dependant for whose benefit the action was brought, not the claim of the administratrix as such.

(ii) accordingly before an administratrix could validly agree to accept a lump sum in settlement of the defendants' liability, (a) each claiming dependant who was sui juris must have approved the terms of the settlement and (b) if any claiming dependants were infants, the court must have sanctioned the agreement as being for their benefit.

Dictum of ERLE, C.J., in *Pym v. Great Northern Ry. Co.* ((1863), 4 B. & S. at p. 406), and dicta of LORD ATKIN and LORD MACMILLAN in *Avery v. London & North Eastern Ry. Co.* ([1938] 2 All E.R. at pp. 595, 599) applied.

Per CURIAM: there was nothing to prevent the widow agreeing that her claim for her own injury should be settled at £3,650, but there were infant children of the deceased and the sum which the widow would receive was relevant to the amount at which a settlement of their claims would be sanctioned, for, if it were inadequate, the children's chance of being properly supported would be prejudiced and larger sums than those provisionally agreed might be awarded to them (compare p. 159, letter I, to p. 160, letter A, post).

Appeal dismissed.

[As to claims under the Fatal Accidents Acts, see 23 HALSBURY'S LAWS A (2nd Edn.) 691-700, paras. 977-988.]

Cases referred to:

- (1) *Bulmer v. Bulmer*, (1883), 25 Ch.D. 409; 53 L.J.Ch. 402; 36 Digest (Repl.) 225, 1198.
- (2) *Avery v. London & North Eastern Ry. Co.*, [1938] 2 All E.R. 592; [1938] A.C. 606; 107 L.J.K.B. 546; 159 L.T. 241; Digest Supp. B
- (3) *Kinneil Cannel & Coking Coal Co., Ltd. v. Sneddon (or Waddell)*, [1931] A.C. 575; 100 L.J.P.C. 113; 145 L.T. 289; 24 B.W.C.C. 181; Digest Supp.
- (4) *Pym v. Great Northern Ry. Co.*, (1862), 2 B. & S. 759; 31 L.J.Q.B. 249; 6 L.T. 537; 121 E.R. 1254; *affd.* (1863), 4 B. & S. 396; 122 E.R. 508; 36 Digest (Repl.) 208, 1093. C
- (5) *Condliff v. Condliff*, (1874), 29 L.T. 831; 38 J.P. 151; 36 Digest (Repl.) 226, 1199.

Appeal.

This was an appeal from a decision of Master DIAMOND, given on July 4, 1958, refusing to approve a settlement arrived at between the plaintiff, Mary Jeffrey (referred to hereinafter as "the widow") and the defendants, Kent County Council, in respect of a claim by the widow as administratrix of her deceased husband's estate, against the council for damages, inter alia, under the Fatal Accidents Acts, 1846 to 1908. The facts and the terms of the settlement appear in the judgment of PAULL, J., which was delivered in open court. D

P. E. Webster (for *J. H. H. Williams*) for the plaintiff widow. E

A. D. Gavin (for *H. T. Buckee*) for the defendants.

Cur. adv. vult.

July 22. PAULL, J.: This is an action brought by a widow in her capacity as administratrix of her deceased husband's estate, claiming damages against the Kent County Council in respect of the death of her late husband. The deceased, in addition to leaving the widow, also left two children, a boy aged six and a girl aged three. The action is brought under provisions both of the Fatal Accidents Act, 1846, and of the Law Reform (Miscellaneous Provisions) Act, 1934. So far as the claim is under the latter Act no question arises. So far as the claim is under the Fatal Accidents Act, 1846, the claim is brought in the following circumstances. F

After the death of the deceased, the council, acting, needless to say, in complete good faith, approached the widow before any writ was issued by her and agreed to pay to her the total sum of £4,350, of which £3,650 was to be in respect of her loss, £300 in respect of her son's loss and £400 in respect of her daughter's loss. The widow considered these sums to be reasonable sums and accepted them in so far as she was able to do so without the consent of the court. G

The widow thereon issued the present writ and served on the council a statement of claim setting out the facts giving rise to the claim and giving the necessary particulars* under the Fatal Accidents Acts, 1846 to 1908. The statement of claim having been served, the widow, without waiting for any defence, issued the summons, which is now before me. The summons asks that the proceedings in the action should be stayed on terms which include that the council do pay into the Dartford County Court in satisfaction of the claim under the Fatal Accidents Acts the sum of £4,350 to be apportioned in the manner to which I have referred above. This summons came before Master H

* By s. 4 of the Fatal Accidents Act, 1846, the plaintiff must give "a full particular of the person or persons for whom and on whose behalf [the action] shall be brought" and the nature of the claim in respect of which it is sought to recover damages. The statement of claim stated that the action was brought for the benefit of the widow and her son and daughter. I

A DIAMOND, who was not satisfied that the amounts were adequate in the circumstances of the case. The council thereon agreed to increase the children's sums to £450 and £550 respectively, but maintained that the master had no jurisdiction to refuse to pass the sum of £3,650, the widow's portion. The council contended before the master, and contend before me, that where there is a settlement and as part of that settlement the widow has agreed to take a definite sum, which is part of the whole sum, the jurisdiction of the court with regard to the widow's sum is only to say how the sum agreed as the widow's portion shall be dealt with, that is, whether it shall be paid in whole or in part directly to the widow, or, if not, into what court it shall be paid. The council agree that the court has full jurisdiction to pass or refuse to pass the settlement so far as the infants are concerned. So far as I am aware, this question as to the court's jurisdiction is one on which there is no reported authority and I have been informed by counsel that different courts have from time to time come to different conclusions.

I was referred to various provisions of the Rules of the Supreme Court, and in particular to Ord. 22, r. 14 (1) and (9). I was also given an interesting historical review of the various forms which r. 14 has from time to time taken. Before, however, the rule can apply, an action must have been brought, and I have reached the conclusion that the key to the problem does not lie in the wording of the rule, but lies in the legal position when the widow as administratrix entered into the agreement with the defendants.

I will first state my conclusion and then the grounds for coming to that conclusion. The conclusion to which I have come is that where the administrator enters into an agreement with the defendant to take a lump sum to cover all the dependants that agreement is not a valid agreement unless: (a) each of the dependants who is sui juris and desires to claim has approved thereof, and (b) the court has sanctioned the agreement as being one for the benefit of each of the dependants who are infants. The court has no power to sanction an agreement unless (a) is fulfilled as well as (b). Where, however, the administrator has with the approval of any dependant who is sui juris, entered into an agreement with the defendant that the defendant should pay to that dependant (whom I shall call the settling dependant) a sum of money which is agreed to be sufficient as being proportionate to the injury suffered by the settling dependant then the settling dependant is bound by the agreement as he would be if he personally entered into such agreement, but the claim of the other dependants still remains to be settled by the court and the court in judging what is the proper amount to be paid to each of the remaining dependants does not take the sum paid to the settling dependant into account unless the amount so paid affects the loss which has been suffered by any of the other dependants. For instance, if a widow agrees to take a sum of money (not as part of a general lump sum settlement but individually) which the court considers is too small and which does not result in her having those resources behind her which she would otherwise have had for the bringing up of her infant children, the court in deciding the injury which has been suffered by the infant children by the loss of their father may give sums to such infants much larger than the sums which the court would have awarded had the widow received a proper capital sum. Clearly the ability of the widow to support the children in the future may be affected by the fact that she has too small a capital sum at her disposal and that would increase the loss suffered by the children by the death of their father.

My reasons for coming to this conclusion are as follows. That there are the two methods of settlement to which I have referred is plain, although the first method (which may be called the lump sum method) is nowadays the usual and indeed the almost invariable practice. In *Bulmer v. Bulmer* (1) (1883), 25 Ch.D. 409, where a question arose as to the proper method of dividing a total sum awarded, CHITTY, J., said (*ibid.*, at p. 412):

“When the questions are before the jury, undoubtedly the right way for

the jury to proceed is either to take the individual claims of the persons on whose behalf the action is brought and to adjudicate on them separately, or to fix on an aggregate sum, and then to divide such sum among the persons entitled. Both of these methods are adopted by juries."

In *Avery v. London & North Eastern Ry. Co.* (2) ([1938] 2 All E.R. 592 at p. 599), LORD MACMILLAN said:

"The damages which the jury are to give are to be such as they may think proportioned to the injury resulting from the death to the parties respectively, and the jury clearly cannot assess and apportion damages due to parties who are not before them, and whose claims have not been the subject of evidence."

Avery v. London & North Eastern Ry. Co. (2) was a case where four widows of four men who had been killed in the same accident brought proceedings under the Fatal Accidents Acts, 1846 to 1908, on behalf of themselves. Each widow did not include as dependants in her action her children, but as next friend elected on the children's behalf to accept compensation under the Workmen's Compensation Act, 1925, so far as they were concerned, thus in effect getting over the difficulty of having to opt whether to take workmen's compensation or claim damages. *Kinneil Cannel & Coking Coal Co., Ltd. v. Sneddon (or Waddell)* (3) ([1931] A.C. 575) had decided that the option whether to take compensation or claim damages is one to be exercised by each individual claimant and had decided that the widow's right to damages could not be defeated by the fact that a stepson had opted to take workmen's compensation. The question in *Avery v. London & North Eastern Ry. Co.* (2) was whether, where proceedings were brought under the Workmen's Compensation Act, 1925, by some dependants and under the Fatal Accidents Acts, 1846 to 1908, by other dependants, the amount recoverable under the Fatal Accidents Acts was affected by the fact that the other dependants had received workmen's compensation. The House of Lords held that it was not, since the amount claimed under the Fatal Accidents Acts is not group compensation, but individual compensation payable to each individual injured by the death.

It is well settled law that the administrator in acting under the Fatal Accidents Acts, 1846 to 1908, is not entitled in his normal capacity as administrator*. He is not collecting assets to be distributed later. As long ago as 1863, in the case of *Pym v. Great Northern Ry. Co.* (4) ((1863), 4 B. & S. 396), it was held that the remedy given by the Act of 1846 is to individuals and not to a class. ERLE, C.J., in his judgment said (*ibid.*, at p. 406):

"The principle which governs these cases appears to us to be, to consider whether there was evidence of a reasonable probability of pecuniary benefit to the parties if the death of the deceased had not occurred . . ."

* Section 2 of the Fatal Accidents Act, 1846 (17 HALSBURY'S STATUTES (2nd Edn.) 5) provides:—"Every [action under s. 1 of the Act] shall be for the benefit of the wife, husband, parent, and child of the person whose death shall have been [caused by negligence], and shall be brought by and in the name of the executor or administrator of the person deceased; and in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought; and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst the before-mentioned parties in such shares as the jury by their verdict shall find and direct". The words "parent" and "child" are defined in s. 5 of the Act of 1846 to include, respectively, father, mother, grandfather, grandmother, stepfather and stepmother, and son, daughter, grandson, granddaughter, stepson and stepdaughter.

Section 2 of the Fatal Accidents Act, 1864 (17 HALSBURY'S STATUTES (2nd Edn.) 9) provides: "Payments into court . . . It shall be sufficient, if the defendant is advised to pay money into court, that he pay it as a compensation in one sum to all persons entitled under the [Act of 1846] . . . without specifying the shares into which it is to be divided by the jury . . ."

A Thus he treated (as indeed did LORD MACMILLAN) the dependants in the action before the court, which was brought by the administratrix in each action as the parties in whom the right against the defendants lay. Indeed, this must be right. LORD ATKIN in *Avery v. London & North Eastern Ry. Co.* (2) ([1938] 2 All E.R. at p. 595) said:

B “... the damages constitute a legal debt due to each of the persons to whom the jury have awarded damages . . . The quantum of damages . . . is not a proportion of a limited sum.”

C It was in *Avery v. London & North Eastern Ry. Co.* (2) also that it was pointed out by LORD ATKIN* that there was no need for all the dependants to join in the action and that if they did not the defendant could not pray in aid the absence of some of the dependants in order to reduce the sum payable to such of the dependants as had joined in the action. LORD ATKIN made it clear that the claim was the claim of the dependants and not of the administrator, and LORD MACMILLAN pointed out† that, if for any reason any dependant did not join in or was not named in the action, he had lost his right to share in the amount awarded but could not bring a second action.

D I apply these principles to a settlement made before any action is brought. If the claim is not the claim of the administrator but the claim of each dependant separately, I do not see how the administrator has power to accept a sum of money in settlement of the whole of the defendants' liability unless each of these persons who has a claim has given him authority to do so. He is certainly not given any such power by the statute. In the case of an infant, of course, the infant cannot give any authority which is binding on the infant, and apart from that it is to be remembered that the interest of the administrator may be in conflict with the interest of the infant if the administrator is a dependant.

F *Condliff v. Condliff* (5) ((1874), 29 L.T. 831) was cited to me as authority for the fact that an administrator can settle an action under the Fatal Accidents Acts, 1846 to 1908. Indeed that case is sometimes quoted in the text-books to establish that proposition. If, however, that case is looked at, it will be seen that the defendant in that action was being sued by one of the dependants for a share of the proceeds which the defendant had received as a result of two actions, in one of which he had sued as administrator under the Fatal Accidents Acts, and in the other for personal injuries. In those actions the defendant in *Condliff v. Condliff* (5) had in good faith and under a judge's order agreed to accept an amount to be paid by the defendants in the two actions in respect of both actions after there had been a judgment for damages in both actions. The defendant in *Condliff v. Condliff* (5) had obtained an order of the court staying proceedings on payment of the sum agreed. The administrator therefore had not acted without an order from the court authorising him to take the course which he desired to take. I do not therefore look on that case as being relevant to the problem which I am considering.

H It follows from what I have said that in the present case the so-called agreement made by the council with the widow as administratrix bound nobody, since it was a lump sum agreement to cover both her claim and the claim of the infants. The proportion which the widow agreed to take came into existence after the lump sum agreement had been made and the validity of that agreement was clearly a condition on which the widow agreed to take and the defendants agreed to pay a certain proportion as her share. The whole agreement is therefore void. I should add that there is nothing to prevent the widow in the present case agreeing that she would take the sum of £3,650 to cover the injury suffered by herself by reason of the death of her husband, but the council

* [1938] 2 All E.R. at p. 595.

† [1938] 2 All E.R. at p. 599.

must realise that such an agreement may result in the court giving considerably greater sums to the infants than those which were provisionally agreed if the court comes to the conclusion that the amount taken by the widow is not as large as the court thinks proper and that therefore the children's chance of being adequately supported during childhood by the widow has been affected. A

In view of the conclusions to which I have come it is unnecessary to refer in any detail to the Rules of the Supreme Court, but it is perhaps as well to point out that those rules as they now exist would appear to fall in with the view which I have taken. Once an action has been taken by the administrator, the court has to see which of the dependants are claiming in that action that they have been injured. If the administratrix in her capacity as a dependant widow has agreed, after the action has been brought, to take a sum of money (not being part of a lump sum) to settle her injury, then the court has jurisdiction under R.S.C., Ord. 22, r. 14 (9) to say whether that money should be paid to the widow in whole or in part or invested by the court. If the widow has settled her individual claim before the action has been brought, she will not be a claimant in the action. If a sum of money has been paid into the court and the widow, with the consent of the defendants, has agreed to take a certain part of that sum as her proportion, the court is in no way bound, when deciding the proper sums to be paid to the remaining dependants, by the amount remaining in court. If, however, a total sum has been recovered in the action by judgment being given for a total sum, then of course the court has to apportion the share to each of the dependants claiming in the action. R.S.C., Ord. 22, r. 14 (1)* merely applies the principle which I have stated to the case where a settlement has been arrived at after an action has been started and makes it clear that the defendant cannot get rid of his liability except on the principles which I have stated. B
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When this matter came before me in chambers, I did not hear any argument whether the amounts in this case were reasonable, as it seemed to me that I could not do so properly until I had determined the principles of law to be applied. The amounts in this particular case are of no interest to anyone except the parties, and I propose to return to chambers to decide that question.

Appeal dismissed.

Solicitors: *J. H. Williams*, Dartford (for the plaintiff widow); *Hair & Co.* (for the defendants).

[Reported by *WENDY SHOCKETT*, Barrister-at-Law.]

* R.S.C., Ord. 22, r. 14 (1) provides: "In any cause or matter in the Queen's Bench Division . . . in which . . . damages . . . are claimed by or on behalf of an infant or a person of unsound mind suing either alone or in conjunction with other parties, no settlement or compromise or payment or acceptance of money paid into court, whether before or at or after the trial, shall as regards the claims of any such infant or person of unsound mind be valid without the approval of the court or a judge".

**BRAITHWAITE v. SOUTH DURHAM STEEL CO., LTD.
AND ANOTHER.**

[YORK ASSIZES (Edmund Davies, J.), June 17, 18, 19, July 2, 1958.]

Licensor—Negligence—Inadvertent trespass by licensee—Duty of licensor unaltered.

Master and Servant—Duty of master—Safe place for servant to work—Narrow walkway between rail track belonging to master and another track belonging to British Transport Commission—Servant injured by traffic on British Transport Commission's track.

Railway—Negligence—Licensee—Duty to keep look-out for licensees on walkway adjoining track.

The plaintiff was employed by the S. Co., the first defendants, as a slinger or crane-driver's mate. The crane was a mobile crane which ran on lines of rails. Alongside the S. Co.'s rail track was a railway line belonging to the second defendants, the British Transport Commission. Between the two tracks was a walkway the width of which varied but which at the scene of the accident was six feet three inches in width, though the clear space between the sleepers was only about two feet six inches. On Feb. 24, 1956, at about 6.30 p.m. the crane was travelling in reverse on the S. Co.'s line and the plaintiff, as was his proper and settled practice, was preceding it by some twenty yards, walking along the walkway between the two tracks. The commission knew that it was the practice of the S. Co.'s employees to use the walkway both by day and by night, and had made no objection, even if the S. Co.'s employees did not keep within the S. Co.'s part of the walkway. The driver of the crane, facing in the opposite direction from that in which the plaintiff was facing, saw that a guard's van, leading a tender and engine, was travelling in reverse in the same direction on the commission's track. The van, the tender and the engine were coasting silently down a gradient, travelling at about five to eight miles an hour, and were overtaking the crane. The guard did not see the plaintiff. The crane-driver, realising the danger to the plaintiff, who was having to pick his way through mud and slush in semi-darkness, shouted to the plaintiff to warn him. Turning round to ascertain the reason for the shouting, the plaintiff inadvertently came nearer to the commission's track and was struck from behind and injured by the van. At the time of the accident some portion of the plaintiff's body was projecting over the sleepers of the commission's line and one of his feet was on the sleepers. The S. Co. realised that there was some danger to their men if, while intent on their work on the company's track, they inadvertently walked too near the commission's track, but the S. Co. had given no cautionary advice to their men nor had they taken any practical steps (e.g., by fencing or notices) to prevent the danger.

Held: both defendants were liable to the plaintiff for negligence for the following reasons—

(i) as regards the S. Co. because they failed to provide him with a safe place of work, and

(ii) as regards the commission, because they owed the duty of a licensor to the plaintiff while he was on the walkway and, though the licence did not extend to the commission's sleepers on one of which the plaintiff had his foot at the time of the accident, yet his encroachment thereon was involuntary, resulting from the warning shouted to him, and should not be regarded as constituting him a trespasser; and, on the facts, the guard had failed to keep a proper look-out and the commission, being responsible for his negligence, were in breach of the duty owed to the plaintiff as licensee.

[As to a master's duty to his servant at common law, see 22 HALSBURY'S LAWS (2nd Edn.) 187-189, paras. 313, 314.]

As to the liability of a licensor to the licensee, see 23 HALSBURY'S LAWS (2nd Edn.) 610, para. 860.]

Cases referred to:

- (1) *Mersey Docks & Harbour Board v. Procter*, [1923] A.C. 253; 92 L.J.K.B. 479; 129 L.T. 34; 36 Digest (Repl.) 15, 60.
- (2) *Addie, R., & Sons (Collieries) v. Dumbreck*, [1929] A.C. 358; 98 L.J.P.C. 119; 140 L.T. 650; 36 Digest (Repl.) 120, 604.
- (3) *Pearson v. Coleman Brothers*, [1948] 2 All E.R. 274; [1948] 2 K.B. 359; [1948] L.J.R. 1781; 36 Digest (Repl.) 55, 303.
- (4) *Trznadel v. British Transport Commission*, [1957] 3 All E.R. 196; 3rd Digest Supp.

Action.

In this action the plaintiff, who at the time of the accident was employed by the first defendants, South Durham Steel Co., Ltd. (referred to hereinafter as "the company") as a slinger or a crane-driver's mate, claimed damages against the company and the British Transport Commission (referred to hereinafter as "the commission") for personal injuries received by him on Feb. 24, 1956, when he was struck by a guard's van belonging to the commission and moving in reverse on their line. The plaintiff alleged negligence on the part of both defendants, and, in addition a breach of statutory duty under s. 26 (1) of the Factories Act, 1937, by the company. No finding was reached on the alleged breach of statutory duty and the case is reported only on the issues of negligence.

The plaintiff, then a man of fifty-two, had worked for some five years as slinger to Mr. Salvin, the driver of a mobile crane, which ran on lines of rails to and from the company's Cargo Fleet Works. As a slinger the plaintiff would assist Mr. Salvin to cope with any derailments or other lifting jobs near the rails, and, in order to see that the road ahead was clear and that the points were properly set, his settled and proper practice was to precede the crane by some twenty or thirty yards, walking ahead on the left or near side of the line if the crane was travelling forward, and on the crane's right or outside if it was proceeding in reverse. Owing to frequent obstructions between the rails the plaintiff had no alternative but to walk on a walkway between the company's track and the commission's track. At the time of the plaintiff's accident, Mr. Salvin was driving the crane in reverse and the plaintiff was, accordingly, properly walking ahead and to the right of the following crane. The accident occurred at a point about a hundred feet from a signal gantry. The time was about 6.30 p.m. It had been snowing and there was slush and some snow underfoot, and the lighting at the spot where the plaintiff was struck was not good, although it was sufficient for him to be seen by anyone keeping a proper look-out. Mr. Salvin and the plaintiff had finished work on a derailment job by about 6.30 p.m. and were proceeding along the company's line when the accident occurred. Mr. Salvin, who was driving the crane at about walking pace, kept his look-out by glancing backwards over his left shoulder. The width of the walkway between the company's track and the commission's track varied, but at the point where the plaintiff was injured, roughly some one hundred feet short of the signal gantry, it measured about six feet three inches, though the actual clear space between the sleepers was only about two feet six inches, sloping slightly upwards from the left to the right as the plaintiff proceeded, the difference in levels varying between three and nine inches. After the plaintiff had walked towards the signal gantry for about a minute Mr. Salvin apprehended that a dangerous situation might be developing, for he could see on the commission's line a guard's van leading a tender and engine proceeding in reverse towards the signal gantry, and he saw also that the plaintiff was picking his way in semi-darkness along the muddy and slushy walkway, which was then approximately two and a half feet in width,

A and was getting near the sleepers of the commission's line. These sleepers were only, at the most, about one foot eleven inches from the outside or nearer edge of the nearer rail, and, as the guard's van overhung that line by about one foot eight inches, it was obvious that a very slight deviation, or even a leaning over by the plaintiff to his right as he proceeded in the walkway, could imperil him.

B Mr. Salvin accordingly blew the crane whistle, but it was defective and ineffective. He thereupon shouted warnings to the plaintiff, but the crane was noisy and only by his third shout did he make himself heard. Meanwhile, the van, tender and engine had coasted in silence down the gradient. On hearing Mr. Salvin's third shout the plaintiff turned to his right to ascertain the reason for it. In so doing he inadvertently brought his left side nearer the rails of the commission and was struck by the van, which fractured his ribs and his left side.

C The court found (a) that about two minutes before the accident, and about three hundred yards farther back, the whistle of the commission's locomotive was sounded, at which time the plaintiff and Mr. Salvin were still at and just about to leave the place where they had completed their derailment job, and (b) that at the time of the accident (i) the traffic on the commission's line was travelling at about five to eight miles an hour, (ii) two white pilot lights were showing on the guard's van, and (iii) a green light showed on the commission's signal gantry to indicate to those whom the signals concerned that up traffic on the commission's line was free to proceed. Moreover, as the court found, the plaintiff knew that as he proceeded towards the signal gantry the commission's line to his right was an up line, that is, one carrying traffic which ran in the same direction as that in which he was walking. Until the moment of hearing Mr. Salvin's shout

E the plaintiff had heard no whistle and was wholly unaware of any approaching traffic, and the fact that the green light was showing on the signals gantry was not a matter which would necessarily make any impression on the plaintiff's mind.

H. C. Scott for the plaintiff.

L. B. Stephen for the company.

F *Alan Goss* for the commission.

Cur. adv. vult.

The following judgment was delivered at Sheffield Assizes.

G July 2. **EDMUND DAVIES, J.**, after stating the facts and reaching the findings previously stated continued: The plaintiff alleges that the company were in breach of their common law duty of reasonable care as his employers. Although expressed in a variety of ways in the statement of claim, the gravamen of the plaintiff's complaint is that they failed to provide him

H "with a safe place of work in that there was very little available room between the two sets of lines and that it was known to the defendants that engines or trains came along the lines occupied by the British Transport Commission without warning and at a time when the plaintiff's attention would be occupied in keeping a look-out for obstructions or points."

I In my judgment, this complaint of a breach of the company's common law duty as the plaintiff's employers is established. In coming to that conclusion I have not been unmindful of the fact that for many years these two tracks had run alongside and that there had, apparently, been no previous similar accident. However, Mr. Stirzaker, the company's safety officer, told me that owing to the debris it would have been stupid for the plaintiff to have walked between the company's lines. In the result, therefore, he would have to walk, as I find, between the company's line and the commission's line. Mr. Stirzaker further agreed with plaintiff's counsel that the company's employees might easily and inadvertently walk too near the commission's line and would thereby be in danger of being struck by any traffic travelling thereon, that this danger was naturally greater in the case of men intent on a job as they walked along, and that, although the

company had this danger in mind for some time, no cautionary advice had been given and no practical steps by fencing, notices or otherwise had been taken. Mr. Morgan, the company's works engineer, candidly admitted that there would be a tendency to walk nearer to the commission's line in as much as the line was then a secondary or dead-end track and waterlogged and requiring the relaying which it received soon after the plaintiff's accident. He agreed that a slight deviation from the centre of the walkway might cause trouble, that such a shoulder as was created between the two sets of lines shortly after the accident would have provided a practical warning of danger, and that without it a man might walk wholly unconsciously into the danger area of the commission's lines and the traffic proceeding thereon. There was no practical reason why, assuming that the resiting of the company's line was impossible, such a shoulder or break should not have been made long before it was. In fact, the company, although alive to the danger inherent in their lay-out, did nothing until it was too late. In these circumstances, I have come to the conclusion that the company were in breach of their common law duty of reasonable care to provide a safe place of work and that this breach played a substantial part in the accident which befell the plaintiff.

I turn to the claim against the commission, which is framed wholly in negligence. There is ample and convincing evidence that if, in the course of treading in the walkway, the plaintiff overstepped into that part of the walkway which belonged to the commission, he did so by their implied licence. The company's employees had used the walkway for years, by day and by night, without demur of any sort and regardless of whether they kept strictly within the company's completely undefined part of the walkway. If, accordingly, injury had befallen the plaintiff while wholly on the walkway as the result of anything done by the commission's servants, their liability would turn on whether or not they had failed in their duty as a licensor to "act with reasonable diligence to prevent his premises from misleading or entrapping a licensee": see per LORD SUMNER in *Mersey Docks & Harbour Board v. Procter* (1) ([1923] A.C. 253 at p. 274). But it is urged on behalf of the commission that, on the proved dimensions of rails, sleepers and guard's van, the plaintiff must have had some portion of his body projecting over the commission's sleepers, and that probably at least one of his feet was actually on the sleepers. From this it was argued (i) that, there being no evidence of a licence to encroach over or to be on such sleepers, the plaintiff must have been trespassing at the moment of his accident, and further (ii) that (a) as the duty owed even to trespassers whose presence is actually known is merely that of not doing an act "with the deliberate intention of doing harm to the trespasser, or at least some act done with reckless disregard of the presence of the trespasser" (per LORD HAILSHAM, L.C., in *R. Addie & Sons (Collieries) v. Dumbreck* (2), [1929] A.C. 358 at p. 365), and (b) since no one suggests that the commission's servants acted either with such deliberate intention or reckless disregard, they were not in breach of any duty owed to the trespassing plaintiff. For the purposes of this judgment, I am prepared to find, and do find, (i) that at the moment of his accident the plaintiff, in all probability, had his left foot actually on the commission's sleepers, and (ii) that the implied licence of the commission to the company's employees to use such part of the walkway as was the commission's property did not extend to the commission's sleepers. Even so, the submissions of learned counsel for the commission appear to me to be unrealistic when sought to be applied to the facts of this case, namely, that (a) the plaintiff was a licensee in the walkway, and (b) his encroachment of a few inches over or on the sleepers of the commission's line was wholly inadvertent and involuntary and the result of his startled turnabout, as a result of the warning shout of Mr. Salvin, the crane-driver.

In my judgment, the quiet coasting and virtually unheralded approach in the darkness of the commission's van, tender and engine and the striking of the plaintiff at a time when, in the proper exercise of the implied licence enjoyed by the

- A company's employees to use the walkway, he was in close proximity to the commission's sleepers, arose from and constituted a breach of the latter's duty of care in relation to their licensees, limited though that duty was. It affronts common sense that licensors, having by their negligence caused a licensee to take a startled and unpremeditated step of a few inches outside the licensed area, should thereafter be entitled to say that, if any portion of the plaintiff's anatomy was outside
- B the licensed area, he must be regarded as a trespasser to whom no duty was owed other than that of refraining from harming deliberately or recklessly. None of the cases cited to me warrant what, in my judgment, would be a wholly artificial approach to the facts of this case as I find them and, were authority to the contrary needed, in my view the ratio decidendi of *Pearson v. Coleman Brothers* (3) ([1948] 2 All E.R. 274), albeit a case involving an invitee, affords some support
- C to a certain degree. In my judgment, accordingly, the commission were in breach of their duty as licensors in running the plaintiff down, as I hold they did, and it is nihil ad rem that at the moment of the collision the plaintiff, consequent on that negligence, was, as on the balance of probabilities I find to be the case, unwittingly encroaching on the commission's land to the extent of a few inches, in instinctive response to the warning shout from his crane-driver. Further-
- D more, having regard to the known practice of the company's employees to use the walkway at all times of the day and night, in my judgment the commission were in serious breach of their duty as licensors. My attention has been drawn to *Trznadel v. British Transport Commission* (4) ([1957] 3 All E.R. 196), and it has been urged on me that in the light of that case I ought to hold that, assuming that the commission owed a duty of care towards the plaintiff,
- E no breach thereof had here been proved; but each case turns on its own facts, and, in my judgment, there is here evidence of a compulsive nature that the commission were in breach of their clear duty of keeping a proper look-out. That the lighting was far from good is established. That the practice of the company's employees to use the walkway at all times was well known to the commission is equally clear, and Mr. Watson, their permanent ways inspector,
- F acknowledged that the guard should keep a look-out for such employees. Be the commission's engine's speed five miles or eight miles an hour, the guard, Mr. Hudson, was quite clear (a) that he could see forty yards ahead, and (b) that the engine's speed was such as to enable it to be halted within twenty yards. Nevertheless, at no time did he ever see the plaintiff, and, indeed, he had no idea why the engine stopped until after the accident had actually occurred. From
- G this evidence, combined with that of Mr. Salvin that, when the engine overtook him, the plaintiff was then so visible to him and his increasingly imperilled position was so obvious that warning shouts and whistles became clearly necessary, it is solidly established that the commission's guard was gravely lacking in his duty of keeping a proper look-out. His employers must, accordingly, be held substantially to blame for the accident which occurred.
- H For these reasons, both defendants have, in my judgment, been proved to have contributed to the plaintiff's accident by their negligence. The apportionment of responsibility between them is not easy, but, after giving the matter the best consideration that I have been able to, and particularly bearing in mind the higher duty, as I regard it, owed by an employer to his employee than that owed by a licensor to a mere licensee, in my judgment the company must bear sixty per
- I cent. of the blame as opposed to the commission's forty per cent. This still leaves to be determined the question whether the plaintiff himself must be held in some degree to blame by reason of his contributory negligence. The complaint that he was negligent in not carrying a lamp is, in my judgment, not substantiated. The only one provided was a Tilley "inspection" lamp—and I stress the adjective "inspection"—a cumbersome object weighing seven and a half pounds without the necessary fuel oil. No practice of carrying such a lamp between jobs was established and, in the circumstances of the case, the defendants, on whom the burden of establishing contributory negligence rests, did not satisfy me that any

failure by the plaintiff in this respect could properly be regarded as blameworthy. I have carefully and, I hope, adequately considered all the other matters pleaded in para. 5 of the first defence and in para. 4 of the second defence as constituting contributory negligence by the plaintiff. In my judgment, none of these complaints is established, and it is not enough to demonstrate that the plaintiff fell short of the higher standards of caution which would be attained by the ultra-prudent. On the contrary, the plaintiff, like the defendants, must be measured by the yardstick of ordinary prudence in the working conditions shown to have been in existence at the material time. Applying this measure, it has not been shown to my satisfaction that the plaintiff fell short of it, and he is accordingly, in my judgment, entitled to be awarded damages unabated by reason of any blameworthy neglect on his own part. I turn finally to the assessment of damages. The accident might have had extremely ugly results. Fortunately, the injuries sustained were comparatively slight. The plaintiff, a solid, decent type of workman, was away from work for some twenty-one weeks and thereafter resumed his pre-accident work, but he claims that he is not as adept at it as he formerly was. I have, however, had presented to me and, of course, abide by two agreed medical reports, the first dated some four months after the accident, the second just under two years after its occurrence. I refrain from quoting from them, but I have sought to bear their contents fully in mind. Doing so and taking into account the agreed special damages of £200 3s. 9d., the total amount to which, in my judgment, the plaintiff is entitled is the sum of £750. There will, accordingly, be judgment against both defendants for £750. In the light of their respective responsibility for the accident, as between the two defendants, I apportion that sum as to £450 in respect of the company and £300 against the commission.

Judgment for the plaintiff against both defendants.

Solicitors: *Samuel Doberman & Richardson*, Middlesbrough (for the plaintiff); *Cohen, Jackson & Scott*, Stockton-on-Tees (for the company); *M. H. B. Gilmour* (for the commission).

[Reported by G. M. SMAILES, Esq., Barrister-at-Law.]

WOODS v. MARTINS BANK, LTD. AND ANOTHER.

[LEEDS ASSIZES (Salmon, J.), July 8, 9, 10, 11, 23, 1958.]

Bank—Advice—Bank offering advice on all financial matters—Negligent advice given by bank manager in regard to investments—Liability to customer for loss suffered—When relationship of banker and customer established.

In May, 1950, the plaintiff, who was thirty years of age and a director of a company having a small sheet metal business but who had no real business experience, asked the manager of the Q. branch of the defendant bank to act as his financial adviser. The manager, who knew the plaintiff to be a man of means, agreed. Subsequently the manager told the plaintiff that he might be able to obtain for him some preference shares in a private company, B.R., Ltd. This company was a customer of the Q. branch of the defendant bank, a fact which, as the manager knew, was known to the plaintiff. B.R., Ltd. had a considerable overdraft with the defendant bank and at all material times was in need of funds. Before the plaintiff had become a customer of the defendant bank, the manager advised him to make the investment in preference shares of B.R., Ltd. On May 9, 1950, the plaintiff authorised the defendant bank to obtain on his behalf the proceeds of certain investments, to re-invest a sum in B.R., Ltd. out of part of the proceeds and to retain the remainder to the plaintiff's order. On June 1, 1950, the defendant bank opened a current account for the plaintiff. Subsequently the manager advised the plaintiff to make further investments in shares of B.R., Ltd. and in a capital transaction in relation to unwanted trading stock of that company. The advice was honestly given throughout,

A but there was no reasonable ground for advising the plaintiff in his own interest to make these investments. In all the plaintiff invested the sum of £14,800 in B.R., Ltd., relying on the manager's advice, and eventually the whole sum so invested was lost. In an action against the defendant bank and the manager it appeared that latterly the bank had advertised that expert advice was one of the advantages that the bank offered to customers, and that, though the advertisements were recent, the matters to which they spoke were true in 1950.

B In 1952 the plaintiff guaranteed the overdraft of a small private company, A. Ltd., with the defendant bank for £1,000. The plaintiff had been orally assured that there was no risk of his being called on to pay. The manager of Q. branch of the defendant bank confirmed this. He had no reasonable grounds for giving this advice. The plaintiff relied on the advice and gave the guarantee. Under it he had subsequently to pay £990 3s.

C **Held:** (i) the scope of the defendant bank's business was a question of fact and to advise on financial matters was within it; therefore, the advice to the plaintiff having been given without the ordinary care and skill that a bank manager should possess, the defendant bank was liable (as also was the manager himself) for the loss occasioned by the advice, viz., for the capital invested by the plaintiff in B.R., Ltd.

D *Banbury v. Bank of Montreal* ([1918] A.C. 626) distinguished.

E (ii) the plaintiff became a customer of the defendant bank on May 9, 1950, at which date the prior advice on the investment in B.R., Ltd. must be taken to have been impliedly repeated; even if, however, the plaintiff had not been a customer of the defendant bank until June 1, 1950, there would have been a duty that the financial advice given to the plaintiff should have been given with ordinary skill and care.

(iii) the plaintiff was entitled to recover against the defendant bank and the bank manager the £990 3s. paid under the guarantee.

F Per CURIAM: in the circumstances of this case the bank manager ought never to have advised the plaintiff at all (see p. 174, letter E, post).

[**Editorial Note.** In relation to the principle that a man should not act as adviser where he has conflicting interests (cf. the per curiam in the headnote), some guidance may be had from the cases decided in regard to the relationship of solicitor and client; see 31 HALSBURY'S LAWS (2nd Edn.) 94, para. 142.

G As to negligence in respect of the duties of a banker, see 23 HALSBURY'S LAWS (2nd Edn.) 663, para. 939; as to negligence in relation to professions requiring skill, see *ibid.*, pp. 577-579, para. 829; and as to there being no legal consequences for negligence where there is no duty to take care, see *ibid.*, p. 568, para. 823, text and note (f).]

Cases referred to:

- H (1) *Le Lievre v. Gould*, [1893] 1 Q.B. 491; 62 L.J.Q.B. 353; 68 L.T. 626; 57 J.P. 484; 36 Digest (Repl.) 9, 27.
- (2) *Low v. Bouverie*, [1891] 3 Ch. 82; 60 L.J.Ch. 594; 65 L.T. 533; 35 Digest 33, 254.
- (3) *Banbury v. Bank of Montreal*, [1918] A.C. 626; 87 L.J.K.B. 1158; 119 L.T. 446; 36 Digest (Repl.) 14, 59.
- I (4) *Giblin v. McMullen*, (1869), L.R. 2 P.C. 317; 5 Moo. P.C.C.N.S. 434; 38 L.J.P.C. 25; 21 L.T. 214; 16 E.R. 578; 36 Digest (Repl.) 10, 33.
- (5) *Whitehead v. Greetham*, (1825), 2 Bing. 464; M'Cle. & Yo. 205; 10 Moore, C.P. 183; 148 E.R. 384; 12 Digest (Repl.) 210, 1506.

Action.

In this action the plaintiff claimed damages for negligence, and, alternatively, for fraud, against the defendants, Martins Bank, Ltd. and Mr. Joseph Johnson, the manager of the defendant bank's Quayside branch at Newcastle-upon-Tyne. The case is reported only on the responsibility of the defendant bank for financial

advice honestly but negligently given. The following is a summary statement of the facts found by the court. A

In 1950 the plaintiff had a disposable capital of about £17,000, invested in building societies, and he also had an interest in a fund which amounted to some £20,000, and which had been established by the plaintiff's father to provide an income for the plaintiff's stepmother during her lifetime. The plaintiff was then about thirty years old and had no real business experience. He and a Mr. Darling were directors of True Shapes, Ltd. which carried on a small sheet metal business. In April, 1950, that company was interested in manufacturing a particular steriliser. At a meeting at that time the plaintiff met Mr. Brock, who managed a private company called Brocks Refrigeration, Ltd., and the second defendant, Mr. Johnson, who was introduced to the plaintiff as Mr. Brock's bank manager and financial adviser. Brocks Refrigeration, Ltd. had only been in existence for a few months. Its business was to sell, instal and service refrigerators manufactured by J. & E. Hall, Ltd. The meeting approved a proposal that Brocks Refrigeration, Ltd. should become distributors of the steriliser. In fact, however, no such steriliser ever had been or was manufactured by True Shapes, Ltd. Brocks Refrigeration, Ltd. was also a customer of the defendant bank's Quayside branch. Between the date of their first meeting and May 9, 1950, the plaintiff met Mr. Johnson three or four times. Mr. Johnson properly considered it part of his duty to attract customers for the defendant bank, and, having learned that the plaintiff was a man of considerable means, set out to acquire the custom of the plaintiff and True Shapes, Ltd. for the defendant bank. Mr. Johnson impressed on the plaintiff that the Quayside branch of the defendant bank was a commercial branch and that he, as the manager of that branch, was at the very hub of financial business in the city of Newcastle-upon-Tyne and in a position to offer the plaintiff much better service than the manager of the suburban branch of the bank at which the plaintiff and True Shapes, Ltd. were then customers. By the beginning of May, 1950, the plaintiff was convinced of Mr. Johnson's financial experience and acumen and had complete confidence in Mr. Johnson's supposed knowledge and skill in financial affairs. The plaintiff asked Mr. Johnson if he would be his financial adviser, to which Mr. Johnson replied that the defendant bank would be only too pleased to take care of the plaintiff's financial affairs. Thereafter Mr. Johnson told the plaintiff that he might be able to get some preference shares for the plaintiff in Brocks Refrigeration, Ltd. At all times Mr. Brock was urgently in need of money for his company, which had an overdraft with the defendant bank. Before May 9, 1950, the district head office of the defendant bank had suggested that the overdraft ought to be reduced. The plaintiff asked Mr. Johnson whether Brocks Refrigeration, Ltd. was financially sound and whether it would be wise for the plaintiff to invest £5,000 in that company's preference shares. The plaintiff knew that Mr. Brock and Brocks Refrigeration, Ltd., were customers of the defendant bank's Quayside branch, and rightly supposed that Mr. Johnson had special knowledge of the company's financial affairs. Mr. Johnson advised the plaintiff that Brocks Refrigeration, Ltd. was financially sound and that, if he were able to do so with his own money or if he were in the plaintiff's place, he would invest £5,000 in the company's six per cent. cumulative preference shares. Subsequently the plaintiff, accompanied by Mr. Sowerby, the manager of the Gosforth branch of Barclays Bank, Ltd., with whom the plaintiff had banked for some time, had another interview with Mr. Johnson, at which Mr. Johnson repeated before Mr. Sowerby the advice which he had previously given to the plaintiff. On May 9, 1950, Mr. Johnson dictated a letter for the plaintiff to sign. It was addressed to the defendant bank and was in these terms: B C D E F G H I

"I hand you herewith Alliance Building Society passbook . . . showing investments for £5,000 together with my letter of authority to that society

A requesting them to pay to you the proceeds of that investment against your discharge. On receipt of such proceeds please pay the sum of £5,000 to [Brocks Refrigeration, Ltd.] against their acknowledgment and undertaking to issue to me five thousand six per cent. preference shares of £1 each and retain to my order the balance of the proceeds."

B The balance referred to in this letter amounted to between £40 and £50, and this sum was put to the plaintiff's credit in a suspense account opened for him by the defendant bank. On June 1, 1950, the defendant bank opened a current account for the plaintiff, and it was conceded that from this date the relationship of banker and customer existed between them.

C At the beginning of October, 1950, Mr. Johnson told the plaintiff that he could acquire a further two thousand five hundred preference shares in Brocks Refrigeration, Ltd. He then told the plaintiff that this company was very strong financially and advised the plaintiff that it would be wise for him to subscribe for the shares. At this stage he knew that the plaintiff's disposable capital was about £17,000, £5,000 of which was already invested in the company's preference shares. Mr. Johnson had then no more reason than he had had in May for advising that the company was strong financially or that the investment was a wise one for the plaintiff to make. The plaintiff, relying on Mr. Johnson's advice, decided to make the investment, and Mr. Johnson made out the cheque for £2,500 for the plaintiff to sign. The plaintiff signed it. Prior to this transaction the company's overdraft had been allowed by Mr. Johnson considerably to exceed the permitted limit, and the district head office had been pressing Mr. Johnson, as appeared from communications passing between him and the district head office of the defendant bank, to procure a reduction of the overdraft. Mr. Johnson, in effect, assured the district head office that the overdraft position would be eased by the additional capital, which he stated was £2,750. These facts were not disclosed by Mr. Johnson to the plaintiff. In November, 1950, the defendant bank's district head office was again urging Mr. Johnson to procure a reduction of the company's overdraft. Mr. Johnson assured the district head office that this would be accomplished by the company unloading unwanted stock to the value of £3,000 on factors. To Mr. Johnson's knowledge, the company tried unsuccessfully during November to unload £3,000 worth of stock on factors and on J. & E. Hall, Ltd. At a meeting at the beginning of December, 1950, between the plaintiff, Mr. Brock and Mr. Johnson, Mr. Johnson told the plaintiff that Brocks Refrigeration, Ltd. had a quantity of stock valued at £5,000 to unload and that, in order to obtain liquid cash for expansion, the company was prepared to sell this stock to the plaintiff for £3,000, providing that the plaintiff would leave the stock with the company on the terms that the company would repurchase it from the plaintiff in nine months' time for £3,300. The plaintiff asked Mr. Johnson for his advice about this proposal. Mr. Johnson recommended to the plaintiff that it would be quite safe and wise for him to enter into this transaction, but told the plaintiff that the stock should be segregated. He did not tell the plaintiff that the real reason for the company requiring the £3,000 was to reduce the overdraft, nor did he tell him that the company had been trying unsuccessfully to sell the stock to factors and to J. & E. Hall, Ltd. Relying on Mr. Johnson's advice, the plaintiff entered into this transaction, and a letter was written to him by Brocks Refrigeration, Ltd. in these terms:

I "We hereby acknowledge your cheque for £3,000 in payment of miscellaneous stock as per attached schedule. In accordance with the arrangement with you we agree to hold this said stock to your order in a separate part of our stores and we hereby further agree that there will be no storage charge and undertake to keep such stock fully insured without cost to you. It is a condition of the arrangement that you on your part will not dispose of any or all of such stock for a period of nine calendar months from the date hereof except to this company, Brocks Refrigeration, Ltd., and it is agreed

between us that all such sales will be on the basis of ten per cent. added to the price at which we have sold the stock to you as per the attached schedule. We, Brocks Refrigeration, Ltd., hereby undertake to repurchase from you piecemeal or in bulk on the terms stated herein the whole of the stock within the said period of nine calendar months from the date hereof. We enclose a duplicate of this letter which please sign over the sixpenny stamp at the foot thereof and return it to us."

This was done. A list of the stock was drawn up and the summary at the end of the list was in Mr. Johnson's handwriting. Although the transaction was in form a sale by the plaintiff to the company, in reality it was a loan by the plaintiff on the security of the stock. The documents constituted an unregistered bill of sale, and, accordingly, afforded the plaintiff no security at all*.

In April, 1951, Brocks Refrigeration, Ltd. issued a debenture charging all its assets to the defendant bank. Shortly before Oct. 17, 1951, the plaintiff went to see Mr. Johnson to seek his advice about a proposal which had been made to him by Mr. Brock. He told Mr. Johnson that Mr. Brock had suggested that the plaintiff should invest a further £4,000 in the company's preference shares and should also acquire three hundred ordinary shares of a nominal value of £1 each at par, with a seat on the board. The plaintiff explained that he had been told by Mr. Brock that the company needed additional capital for further development in the Yorkshire area. Mr. Johnson appeared to know all about the proposal. He confirmed that the company needed the extra capital of £4,000 for further development, and said that J. & E. Hall, Ltd. had asked the company to extend its business in the Yorkshire area. He advised the plaintiff that it would be a very wise move on his part to take up the shares. Relying on this advice, the plaintiff decided to take up the shares, and made out cheques for £4,000 and £300, which he left with Mr. Johnson. At this time the permitted limit of the company's overdraft was £18,000 on the strength of the debenture, the company's assets having been assessed by the defendant bank at £25,000. The company had been allowed by Mr. Johnson to exceed this limit and had an overdraft of about £20,500. The district head office had been pressing Mr.

* An unregistered bill of sale by way of security is void; see 3 HALSBURY'S LAWS (3rd Edn.) 306. On the merits of the investments in Brocks Refrigeration, Ltd., so far as they had been made by the plaintiff at this time, HIS LORDSHIP (SALMON, J.) observed: "The plaintiff had now, as a result of Mr. Johnson's advice, sunk £10,500 of his disposable capital of about £17,000 in Brocks Refrigeration, Ltd. If the company foundered, and there was a grave risk of its doing so, as should have been obvious to Mr. Johnson, the plaintiff would lose his money. If the company made a huge success, as Mr. Johnson, no doubt, hoped that it would, the equity shareholders would reap the benefit, but it would profit the plaintiff nothing. Any investment in Brocks Refrigeration, Ltd. would have been unwise. An investment which gave the investor a share in the equity commensurate with the capital which he was investing, though unwise, would at any rate have been a gamble, if an extremely hazardous one. The investment of £7,500 in preference shares and £3,000 in a loan had nothing to commend it. There is nothing to show that six per cent. was an unusually high yield in 1950 on preference shares in sound private companies. There is some evidence that at this time $3\frac{1}{2}$ to four per cent. was the average yield on preference shares in 'blue chip' companies. One would expect such a difference of yield between a first class public company, where the investor can at any time realise his investment, and a private company, where he cannot. There are two requirements for any preference share: one, that the money invested shall be safe, and, two, that the stipulated interest shall be paid. Any ordinarily prudent and competent bank manager, especially the bank manager of a commercial branch, should know that before advising the investment of money in the preference shares of any company, let alone a private company, he should be able to see, from the balance-sheet figures, that the financial position of the company is strong enough to ensure that the investor's capital is safe and, from the trading history of the company, that the interest would be paid. I cannot imagine that any ordinarily prudent and competent bank manager, on the facts and figures which Mr. Johnson had before him, would have advised the plaintiff to make any investments in preference shares of this company, whatever the supposed yield had been, still less that he would have advised a customer to enter into the £3,000 loan transaction."

A Johnson to secure a reduction of the overdraft to within the permitted limit, as was shown by an internal memorandum of Oct. 17, 1951, from the district head office. No mention of the company's overdraft was made by Mr. Johnson to the plaintiff. Mr. Johnson did not disclose to the plaintiff that a debenture had been issued to the bank, nor did he say a word to the plaintiff about the company's alarming trading position for the year ending Oct. 31, 1951. Mr. Johnson had

B been supplied with quarterly figures, though the profit and loss account for 1951 was not then in his possession. The loss shown by the accounts for 1951 was £21,000. The previous year's accounts to Oct. 31, 1950, which Mr. Johnson had, showed that the liquid assets were not sufficient to meet current liabilities and that average monthly expenditure exceeded average monthly revenue.

C Shortly before this transaction, as Mr. Johnson well knew, the plaintiff's disposable capital had become exhausted. He had sunk £10,500 in Brocks Refrigeration, Ltd. and a considerable sum in True Shapes, Ltd. and the balance he had spent on himself. Mr. Johnson advised the plaintiff that he might get his hands on the fund set up by his father to provide his stepmother with an income by paying his stepmother an annuity equal to her then income. This could be done for about £5,000, leaving the plaintiff with the balance of the fund

D for his own enjoyment or to be invested in accordance with Mr. Johnson's advice. It was out of the moneys received from this fund that the £4,000 for preference shares was found in October, 1951. So urgent was the necessity on Oct. 17, 1951, to reduce the company's overdraft or to obtain some further security against it that, until such time as the plaintiff was able to realise £4,000 worth of securities from his stepmother's fund, he was asked by Mr. Johnson to give, and he did give,

E a guarantee to the defendant bank of £4,000 in favour of Brocks Refrigeration, Ltd. The plaintiff had only the haziest notion of what was happening in relation to this guarantee, and relied entirely on Mr. Johnson.

In February, 1952, there was an interview between the plaintiff, Mr. Johnson and Mr. Brock. A small private company, called F. Adamson, Ltd., in which

F Mr. Brock was interested and which was a customer of the defendant bank, required a guarantee of £1,000 on its bank overdraft. Mr. Brock assured the plaintiff that the signing of the guarantee would be a mere formality and that there was no risk of the plaintiff being called on to pay. Mr. Johnson confirmed this and advised the plaintiff that F. Adamson, Ltd. was sound financially and that its overdraft would undoubtedly be discharged by moneys outstanding which would be coming in during the next twelve months. Mr. Johnson advised the

G plaintiff that there was no real risk of his being called on to pay under the guarantee. Mr. Johnson had no reasonable ground for giving this advice. The plaintiff signed this guarantee relying on the advice which he received from Mr. Johnson. Ultimately the plaintiff was called on to pay, and paid, £990 3s. under this guarantee.

H The plaintiff now claimed against the defendant bank and Mr. Johnson the sum of £14,800 which he lost in Brocks Refrigeration, Ltd. and the sum of £990 3s. which he was called on to pay under his guarantee for F. Adamson, Ltd. His LORDSHIP (SALMON, J.) found the facts and matters which have been summarised previously and, also: (a) that the plaintiff's inexperience and need of advice were obvious to Mr. Johnson; (b) that, but for Mr. Johnson's advice, the plaintiff would not have made the investments which he made in Brocks Refrigeration,

I Ltd.; (c) that there were no grounds on which Mr. Johnson could reasonably have advised that Brocks Refrigeration, Ltd. was in a sound or strong financial position; (d) that the instructions contained in the letter dated May 9, 1950, from the plaintiff to the defendant bank were accepted by the bank as the plaintiff's bankers, and that the relationship of banker and customer existed between the defendant bank and the plaintiff as from that date; and (e) that the express advice given by Mr. Johnson to the plaintiff before May 9, 1950, was implicitly repeated on that date.

P. Stanley Price, Q.C., and J. A. Baldwin for the plaintiff.
G. S. Waller, Q.C., and J. F. S. Cobb for the defendants.

Cur. adv. vult.

July 23. **SALMON, J.**, read a judgment in which he stated the facts and findings and, having intimated that it had been negligent to omit the memoranda* passing between Mr. Johnson and the defendant bank's district head office relating to Brocks Refrigeration, Ltd. from the defendants' affidavit of documents, continued: The claim in fraud fails, since I am not persuaded that the defendant, Mr. Johnson, did not honestly believe in the advice which he gave to the plaintiff. As to the claim in negligence, the defendants take the point that Mr. Johnson did not advise the plaintiff as he alleges. I am against the defendants on this point. In my judgment, the plaintiff received the advice from Mr. Johnson which the plaintiff says that he received. The defendants' next point is that it was no part of their business as bankers to advise on such financial transactions as those into which the plaintiff entered with Brocks Refrigeration, Ltd., or in relation to F. Adamson, Ltd., and that, accordingly, they were under no duty to advise the plaintiff carefully or competently in these matters. They say that, however careless or incompetent the advice which the defendant, Mr. Johnson, gave the plaintiff may have been, since the defendants were under no duty to the plaintiff they are not responsible for any loss that may have been caused by that advice. They rely on *Le Lievre v. Gould* (1) ([1893] 1 Q.B. 491), *Low v. Bouverie* (2) ([1891] 3 Ch. 82), and, in particular, on *Banbury v. Bank of Montreal* (3) ([1918] A.C. 626). This latter case seems to me to turn on its own special facts, and particularly on the fact that, as LORD PARKER of WADDINGTON said ([1918] A.C. at p. 702), the plaintiff there admitted that the bank manager "had no general authority to advise—in other words, that it was not within the scope of the bank's business to advise on investments at large".

In my judgment, the limits of a banker's business cannot be laid down as a matter of law. The nature of such a business must in each case be a matter of fact and, accordingly, cannot be treated as if it were a matter of pure law. In considering what is and what is not within the scope of the defendant bank's business, I cannot do better than look at their own publications. I look first at their advertisement, exhibit P.6, which is in these terms:

"Although Martins is a bank with over six hundred branches and world-wide connexions our system of decentralisation keeps us in touch with the customer's closest problems. We have six district head offices with boards of directors and general managers, so that the very best advice is available through our managers virtually on your doorstep."

The advertisement is headed "We share your problems". Then I consider their booklet, exhibit D.10. The material parts read as follows:

"If you want help or advice about investments our managers will gladly obtain for you advice from the best available sources in such matters."

I observe that the "best available source" in this case was the bank itself, who were the bankers for Brocks Refrigeration, Ltd., and thus knew everything that there was to know, or were in a position to know all that there was to know, about that company's financial standing. The next passage which I read is as follows:

"In all these matters strict secrecy is observed and your affairs will not be divulged to any other person, relative or otherwise, without your knowledge or permission. You may consult your bank manager freely and seek

* These memoranda were such, e.g., as a memorandum of Oct. 17, 1951, which is referred to at p. 171, letter A, ante, and the communications passing between the district head office and Mr. Johnson, referred to at p. 169, letters D and E, ante.

A his advice on all matters affecting your financial welfare. All these advantages are yours as the possessor of a bank account, current or deposit, and in these difficult days, when financial problems of one kind or another always seem to be cropping up, it is a great comfort to know that you have an impartial friend whose help you may seek without obligation."

B I hardly think that it would be reasonable to construe those words as meaning "without obligation to the bank". Those words seem to me to be in the widest possible terms—"you may consult your bank manager freely and seek his advice on all matters affecting your financial welfare". Then at the end of the booklet there is this paragraph:

C "We have not gone into great detail, but if there is anything about which you would like more information please call in at the branch most convenient to you. We shall be delighted to make your acquaintance and to help you with your finances in every possible way, and we very much hope that you will have been sufficiently attracted by the impressions you have formed after reading this booklet to have made up your mind to join the great band of satisfied customers who bank at Martins."

D It is true that these publications saw the light of day only recently, but Mr. Johnson, who has a lifelong experience with the defendant bank and who was the only witness called on their behalf, said in evidence that the matters which they speak to were as true in 1950 as they are today. I find that it was and is within the scope of the defendant bank's business to advise on all financial matters and that they owed a duty to the plaintiff to advise him with reasonable care and skill in each of the transactions to which I have referred. It is at any rate remarkable that the defendant bank, who seem to be keen competitors with other banks to obtain custom and who, in order to do so, apparently spend large sums of money in advertising that one of the advantages which they offer is expert advice in all financial matters without obligation, are taking the point in this court that they are under no duty to use any care or skill in giving such advice.

F The defendant bank relies on a book of secret instructions circulated to their branch managers. So secret is this book of instructions that the bank objected to producing it and produced only a photostat copy of the page containing instructions relating to stock exchange transactions, exhibit D.9. They read as follows:

G "As the giving of advice to customers about stocks and shares other than concerning procedure is fraught with danger, managers must not directly advise the purchase or sale of any investment... The order should be recorded in the stocks and shares bought and sold register and passed in writing to the broker... Each branch should transact stock exchange business through the broker or brokers allotted to it by head office or district office, unless in any particular case a broker is specifically named by the customer."

H These instructions, which are headed "Stock Exchange Transactions", appear to relate only to stock exchange transactions and do not affect the kind of transactions with which this case is concerned. In any event these instructions do not, in my judgment, alter the true scope of the bank's business any more than any secret instruction issued by a firm of solicitors to their managing clerks, forbidding them to advise on any particular legal topic save through counsel, would cut down the scope of the firm's business vis-à-vis its clients.

I The next point taken by the defendants is that the plaintiff was not a customer of the defendant bank at the date of the first transaction in May, 1950, in that no current account had then been opened by the plaintiff, and that, therefore, they owed the plaintiff no duty of any kind, at any rate in respect of this transaction of May, 1950. I have already stated that, in my judgment, the plaintiff was a

customer of the defendant bank on May 9, 1950*. Nevertheless, even if he did not become a customer until later, the defendants would still, in my judgment, have been under a duty to exercise ordinary skill and care in advising him in relation to the £5,000 transaction. I have found that it is part of the defendants' business to advise customers and potential customers on financial matters of all kinds. In May, 1950, the plaintiff paid business, not social, calls on Mr. Johnson in his office. The plaintiff made it plain that he was consulting Mr. Johnson as manager of the defendant bank's Quayside branch. The plaintiff was a potential customer and one whose custom Mr. Johnson was anxious to acquire and soon did acquire. The plaintiff had asked Mr. Johnson if he would become his financial adviser, to which Mr. Johnson had replied that the defendant bank would be glad to take charge of his financial affairs. No doubt Mr. Johnson could have refused to advise the plaintiff, but, as he chose to advise him, the law in those circumstances imposes an obligation on him to advise with reasonable care and skill. This seems to me to be an even stronger case from the point of view of the plaintiff than cases of gratuitous deposit, such as *Giblin v. McMullen* (4) ((1869), L.R. 2 P.C. 317), or gratuitous services, such as *Whitehead v. Greetham* (5) ((1825), 2 Bing. 464), where it has been held that an obligation to use due care and skill may arise.

The defendants then take the point that Mr. Johnson was not negligent in the advice which he gave the plaintiff. Clearly Mr. Johnson was not negligent merely because his advice turned out to be wrong. Nor could he be negligent because he failed to exercise some extraordinary skill or care. His only obligation was to advise with the ordinary care and skill which the ordinary bank manager in his position might reasonably be expected to possess. It seems to me to be plain that in the circumstances of this case he ought never to have advised the plaintiff at all—certainly not without making a full disclosure to the plaintiff of the conflicting interests between the plaintiff and the defendant bank and the plaintiff and the defendant bank's other customers concerned. No one but an extremely foolish man or a knave could have given the plaintiff the advice given him by Mr. Johnson. I do not think that he is a knave. On the other hand, it is quite plain that none of the advice which he gave the plaintiff comes within measurable distance of being reasonably careful or skilful.

The last point taken by the defendants is that the plaintiff's loss was not occasioned by any negligence on the part of the defendants. It is argued that, even had Mr. Johnson advised the plaintiff against making any investment in Brocks Refrigeration, Ltd., and against giving the guarantee, the plaintiff would still have acted as he did. The plaintiff did not strike me as being an over-confident young man or one who would not take advice. I think that he had just enough sense to realise that he was no match for Mr. Brock, and I am certain that he relied entirely on Mr. Johnson's advice to protect him in his financial dealings with Mr. Brock.

I hold that, but for Mr. Johnson's advice, the plaintiff would never have made any of the investments which he did make in Brocks Refrigeration, Ltd., nor have given the guarantee in favour of F. Adamson, Ltd. The fact that the plaintiff was the kind of young man who might have lost his money in other unwise transactions or soon spent it, perhaps more enjoyably, on extravagant living is beside the point. He has made out his case in negligence against both defendants and has established that he has lost £15,790 by reason of that negligence. There must, accordingly, be judgment for the plaintiff against both defendants for that sum, with costs.

Judgment for the plaintiff against both defendants.

Solicitors: *Swinburn G. Wilson & Son*, Newcastle-upon-Tyne (for the plaintiff); *Criddle, Ord & Muckle*, Newcastle-upon-Tyne (for the defendants).

[Reported by G. M. SMAILES, ESQ., Barrister-at-Law.]

* See p. 171, letter I, ante. † Compare footnote p. 170, ante.

A

**BIRCH v. COUNTY MOTOR AND ENGINEERING CO., LTD.
AND ANOTHER (SHUKER Third Party).**

[COURT OF APPEAL (Lord Evershed, M.R., Romer and Ormerod, L.JJ.),
July 9, 10, 1958.]

B

*County Court—Transfer to another county court—Collision of motor vehicles—
Second action arising out of same accident—Whether more fairly triable in
another court—Discretion—County Court Rules, 1936, Ord. 16, r. 1 (1).*

The plaintiff was a pillion rider on a motor cycle driven by S. which
collided with a motor car driven by F., the second defendant, who was
employed by the first defendant. The plaintiff and S. received injuries.

C

S. brought an action against the first defendant claiming £50 damages.
The only witnesses of the accident were the plaintiff, F. and S., all of whom
gave evidence in the action brought by S. On the only disputed question

D

of fact, the county court judge accepted the evidence of F. The county
court judge found both S. and F. negligent, and apportioned the blame as
to three-fourths to S. and as to one-fourth to the first defendant. The

E

plaintiff, who received more serious injuries than S., later started the
present action in the same county court claiming against both defendants
damages limited to £400. S. was joined as third party. The defendants
applied under the County Court Rules, 1936, Ord. 16, r. 1 (1), to have the
action transferred to another county court on the ground that the judge
having decided in the earlier case that the first defendant was in some

F

degree of blame, the result of the present action, in which the facts, evidence
and witnesses were the same as in the earlier case, would in practice be that
the plaintiff would recover from the first defendant the full amount of any
damage proved. The county court judge rejected the application on the
ground that it amounted to an application for a re-trial of the earlier action,
and that to grant such applications would lead to a multiplicity of actions.

G

On appeal,
Held: the matter was one for the judge's discretion and, though his
reasons for the exercise of his discretion were not wholly satisfactory, yet
the Court of Appeal would not interfere with his rejection of the application,
because this was not a case in which a strongly unfavourable view of a
witness's evidence had been formed so that there was no reason why the
judge should feel embarrassed in trying again (as he must) the same issues
nor was it a case where any injustice or unfairness to the defendants might
appear to be involved by his doing so.

Appeal dismissed.

[As to the transfer of actions between county courts, see 9 HALSBURY'S
LAWS (3rd Edn.) 241, 242, para. 553.]

H

For C.C.R., Ord. 16, r. 1, see COUNTY COURT PRACTICE (1958) 382.]

Case referred to:

(1) *Clare Rural District Council v. Collen*, (1907), 72 J.P. 115; 13 Digest
495, 447.

I

Interlocutory Appeal.

This was an appeal by the defendants from an order of His Honour JUDGE
EVANS at Shrewsbury County Court on June 11, 1958, whereby he dismissed
an application by the defendants under the County Court Rules, 1936, Ord. 16,
r. 1 (1), for an order that this action be transferred to Wolverhampton County
Court. The facts appear in the judgment of LORD EVERSLED, M.R., at p. 176,
post, and are summarised in the headnote.

M. R. Hoare for the defendants.

R. G. Freeman and *N. B. Primost* for the plaintiff.

LORD EVERSHERD, M.R.: By Ord. 16, r. 1 (1), of the County Court Rules it is provided: A

“If the judge of any court is satisfied that any proceedings in that court can be more conveniently or fairly tried in some other court, he may order them to be transferred to the other court.”

In this action the defendants, County Motor and Engineering Co., Ltd., and Herbert Oliver Farmer, applied to the county court judge of Shrewsbury County Court for an order under that rule, transferring the case to another county court, viz., Wolverhampton, which is admittedly the convenient and proper court if any transfer at all is to be ordered. B

The case arises out of a road accident which occurred on Apr. 27, 1957, near Shrewsbury, after dark, or as it got dark, at 9.30 in the evening. The persons involved in the collision were three: two boys, one Michael Kenneth Shuker driving a motor cycle, and Brian Birch, his pillion passenger, and thirdly the defendant Herbert Oliver Farmer, who was driving a Land Rover motor car. Mr. Farmer found that he had erred in his way and, coming to a roundabout, he made up his mind that in order to gain his proper direction he must completely encircle the roundabout and return for a short distance whence he had come. He appears to have changed down the gear of the Land Rover which at that time, according to the evidence in another case which I shall mention in a moment, was on a four-wheel drive, and thus the speed of the Land Rover was very abruptly reduced. Shuker and his passenger were very close behind on the motor cycle and ran into the Land Rover. The accident was not serious; Farmer, the driver of the Land Rover, was not, so far as I know, injured; Shuker, the driver of the motor cycle, was injured, but not severely; Birch, the pillion rider, sustained far and away the most serious injuries. C
D
E

An action was brought by Shuker against the County Motor and Engineering Co., Ltd., being Farmer's employer and the owner of the Land Rover, and that action, to which Birch was not a party, was tried by the learned county court judge at Shrewsbury. The result of that case was that the judge held both Shuker and Farmer to have been negligent, though he attributed the blame as to three-fourths to Shuker and one-fourth only to the defendant, the County Motor and Engineering Co., Ltd. I shall return presently to refer briefly to one passage in the learned judge's judgment. The damage found in the Shuker action was £50 and, having regard to the apportionment, Shuker recovered £12 10s. F

The present proceedings have been brought by Birch, the pillion rider, against the County Motor and Engineering Co., Ltd., joining in this case Farmer, its driver, and Shuker has been joined as a third party. The claim in the present action is for damages assessed at £400, greatly in excess of those recovered, or claimed, by Shuker. That is an important fact, because having regard to the amount of the claim, the case, on the face of it, is one from which, under the present rules, an appeal would lie to this court on fact, whereas of course no such appeal would lie in Shuker's action. G
H

The defendants applied for a transfer from the Shrewsbury County Court on the ground that the judge having made up his mind on the other case that the County Motor and Engineering Co., Ltd. was in some degree to blame, the result in practice would be, not improbably, that Birch would recover the full amount of any damages proved, from that company. He would not, of course, be affected by any apportionment between that company and Shuker, and Shuker may or may not be worth powder and shot, as the phrase goes. I

When the matter came before the learned judge, he rejected the application, and there is before us a short note of what occurred. According to that note, the learned judge observed that he had never heard of an application like this before. He said: “You are asking for a re-trial? I am not a jury!”—that being an observation derived from a reference made in the notes to the County Court Rules, 1936, Ord. 16, r. 1, to *Clare Rural District Council v. Collen*

A (1) ((1907), 72 J.P. 115) which was a jury case, and where it was said that if a jury is likely to be biased, then the proper course is to ask for a transfer to another county court. The learned judge went on to say:

“ I remember the facts and the judgment I gave; my only doubt was whether I had understated your clients’ [the defendants’] negligence.”

B Then later, at the end, a note is added by the learned county court judge, which reads as follows:

“ I agree that this was the gist of what I said although I hope the application was not dealt with as abruptly as would appear from this short note of the proceedings. I also said that, in my opinion, this was an ingenious attempt to obtain a new trial (in effect) when a party was dissatisfied with a finding from which no appeal lay, and that to grant such applications would lead to multiplicity of actions.”

C Having regard to the wording of the rule and the use of the words “ is satisfied ”, I would say that prima facie at any rate the success of an application made under that rule must be a matter for the discretion of the judge who hears it; but counsel for the defendants has pointed out that the observations attributed to, and added by, the judge seem to indicate that he had not really appreciated the basis of the application, and I must confess that on this record I think that there is some cause for that criticism. After all, for reasons which are obvious—

D one of them being the ability of the dissatisfied party in this case to appeal on the facts—it would be quite wrong for the judge to say: “ I am not going through this again; I have tried it; I have found the answer, and this accordingly is the result in the present case ”. That would be no trial at all, and if that happened, and if the defendants appealed, it would be at any rate not an extravagant probability that this court might order a new trial, which would then undoubtedly go to a new judge, and the result which the judge here sought to avoid would be achieved. On the other hand I should be loath to assent in this court to an application which a judge had rejected, unless I were satisfied that

E there were good grounds for such a course, more particularly since the result might be to establish a general rule of practice for cases where the same subject-matter gives rise to the possibility of several proceedings; which I am not satisfied would be right or desirable. I think it right, therefore, to look further at what happened in the former case. I have said that Birch was not a party, but I gather from learned counsel who have assisted us today that the three

F persons involved in the accident were the three (and the only three) witnesses; I gather that no other witnesses could in fact assist. So Birch, Shuker and Farmer all gave evidence.

At this stage I will read a passage from the judgment in the Shuker case. The learned judge says:

“ I do not think that there can be any doubt that he (Farmer) did slow down suddenly by putting his vehicle into a lower gear. A director of the firm said that it slows up quickly when a change is made with a four-wheel drive. He [Farmer] did this because he was inexperienced. He did not know how to change the four-wheel drive. I think, having heard his evidence, that he did give a signal. I think he did put his arm out.”

H That is a reference to the fact that Farmer so swore, and Shuker, and I dare say Birch, said either that it was not so or that they had not seen it. The judgment goes on:

“ Also at that time he [Farmer] did not know whether there was anything behind him. I am not satisfied that he turned suddenly. When he came to this island, I think that his mind was occupied on his job. Having taken the wrong turning he said that he knew he would have to go round the island. He said that he did not know there was anything behind him. In a statement which he made to the police, however, he said that he had seen a

light behind him which probably was a vehicle. Today he said the light had disappeared. In my view he was not applying his mind to the matter that night and he ought to have known that there was some vehicle about."

Then the learned judge deals with the plaintiff, Shuker.

That finding quite clearly is not a finding unfavourable to Farmer as a witness. On the one apparent controversial matter, namely "Did he give a signal?" the judge found in Farmer's favour. From that it would appear clear enough to me that the real question was: What inference ought the judge to draw as to negligence from facts which in the end were not substantially in dispute? And, more important still, this is not a case in which the judge formed a very unfavourable view of a witness or his credibility. I think that when that is so, a judge who then finds that he has to try another action involving the same point, or the same subject-matter, and who has formed a very strong view about a witness, might well feel embarrassed in trying again the same issues; but for reasons which I hope I have made clear, I do not think that this is such a case. In those circumstances, therefore, I feel that notwithstanding the reasons which the judge appeared to give and which were not, on the face of them, if I may say so, entirely satisfactory, the judge was entitled to reach the conclusion he did, and that conclusion does not involve any injustice or unfairness to the defendants, or indeed (as I think) a result that although justice were done, it might not to the defendants at any rate appear to have been done.

It is plain that the learned judge must re-try the matter, and learned counsel before us say that they certainly would make that quite clear. On the other hand, of course, it may mean that the trial may be shorter because some matters will no doubt really be no longer much in dispute. Subject to that, the learned judge must hear the witnesses. It may indeed be that under new cross-examination or new argument he will change or modify his mind about some points. I think that the learned judge had in mind that as a responsible judge he ought to be relied on to be able to do that, and I so read his reference to the jury. "I am not", says he, "a jury"; and no one, I think, would assert that an experienced judge would be liable to be so prejudiced by some view he had formed on a previous occasion as not to be able to re-open his mind.

I think that is all I need and should, say, because after all we are not trying this action. I have come to the conclusion, for the reasons stated, that we ought not on this occasion to interfere with the conclusion reached by the learned judge, although I repeat that for my part I think the grounds he stated, as recorded, are not entirely satisfactory. I am quite sure that he will appreciate that he must try this case. Subject to that, I dismiss this appeal.

ROMER, L.J.: I agree. I confess that I should not have been altogether surprised myself if the learned county court judge had acceded to this application, but it is quite clear that he had the relevant rule, Ord. 16, r. 1 (1) of the County Court Rules, in mind, because he refers to it in his note, and it is a legitimate assumption, therefore, that he applied his mind to the terms of the rule; that he considered the matter and came to the conclusion that he could fairly try this action, unprejudiced by the result at which he had arrived in the previous proceedings. As my Lord has said, it will have to be a real trial, and having regard to the amount which is being claimed in this present action, an appeal will lie on questions of fact, and the learned judge no doubt will bear that in mind, listen to the evidence and take a note of it.

It seems to me that it is impossible for this court really to say that the judge exercised his discretion on a wrong principle or in a way which cannot be upheld. It is possible, though improbable, that further evidence may be called in this action which was not called at the original trial, as indeed it is also possible that the result of the evidence, by reason of a different form of cross-examination or further questions put, might throw a different light on the evidence of the

A witnesses from that which emerged at the last hearing. I am satisfied that there is no tangible risk of injustice to the defendants in having this case tried by the same judge as tried the last one, and I would agree, therefore, with LORD EVERSHED, M.R., in dismissing the appeal.

B **ORMEROD, L.J.:** I agree. It is clear from the rule that the question here is entirely a matter for the discretion of the learned county court judge, and it does not appear that he has taken into account matters which were not relevant to the proper exercise of his discretion. It may well be, of course, that other judges in similar circumstances might have come to a different conclusion and exercised their discretion in a different way, but that is no ground for allowing this appeal. I agree that the appeal should be dismissed.

C *Appeal dismissed.*

Solicitors: *Peacock & Goddard*, agents for *J. C. H. Bowdler & Sons*, Shrewsbury (for the defendants); *O. H. Parsons* (for the plaintiff).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

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HUGHES v. HUGHES.

E [COURT OF APPEAL (Hodson, Morris and Sellers, L.JJ.), June 16, 30, July 30, 1958.]

Solicitor—Lien—Retaining lien—Divorce suit—Whether petitioner's solicitor entitled to absolute or qualified lien.

F On Nov. 11, 1957, a petitioner in a divorce suit discharged the firm of solicitors whom he had originally instructed, and instructed I., who took over the papers and gave a written undertaking to respect the first firm's lien. On Mar. 26, 1958, the petitioner discharged I., without any misconduct on the part of I., and instructed new solicitors. The petitioner then obtained an order against I., directing him to deliver up to the petitioner's new solicitors all papers in his possession relating to the cause, on the undertaking of the new solicitors to respect the liens of the first firm and of I. It was further ordered that I. should be relieved of his undertaking to respect

G the first firm's lien. On an appeal by I.,

Held: (i) I. had an unqualified retaining lien over such papers in the cause as were in his possession, and in this regard divorce proceedings were no different from any other civil litigation, notwithstanding that it was the duty of the court under the Matrimonial Causes Act, 1950, s. 4, to make a full investigation of the facts.

H (ii) the court had no jurisdiction to relieve I. of the undertaking given by him to the first firm.

Decision of WRANGHAM, J. ([1958] 2 All E.R. 366) reversed.

I [As to delivery up of papers in possession of solicitor and required for conduct of suit, see 31 HALSBURY'S LAWS (2nd Edn.) 244, para. 268; and for cases on the subject, see 42 DIGEST 305, 306, 3388-3407.]

Case referred to:

(1) *Re Rapid Road Transit Co.*, [1909] 1 Ch. 96; 78 L.J.Ch. 132; 99 L.T. 774; 10 Digest (Repl.) 1004, 6902.

Interlocutory Appeal.

This was an appeal by Mr. Edward Isaacs, the petitioner's former solicitor, from an order of WRANGHAM, J., dated Apr. 23, 1958, and reported [1958] 2 All E.R. 366, affirming an order of Mr. Registrar COMPTON MILLER, directing

Mr. Isaacs to deliver up to the petitioner's present solicitors all papers in his possession relating to the cause, on the undertaking of the present solicitors to respect Mr. Isaacs' lien and that of another firm of solicitors whom the plaintiff had instructed and had discharged before instructing Mr. Isaacs, and directing that Mr. Isaacs should be relieved of his undertaking to respect the first firm's lien. The cause was a suit for divorce.

R. F. Ormrod, Q.C., and S. E. Brodie for Mr. Isaacs.

Miss A. M. Ryan for the petitioner.

Cur. adv. vult.

July 30. **HODSON, L.J.**, read the judgment of the court: The question involved is an important one, although it is in this case, as the petitioner now recognises, of no significance, since there are said to be no papers in the possession of Mr. Isaacs without which the petitioner cannot get on. There is no evidence as to the nature of the papers in question except that they include an opinion of counsel and some draft particulars. Accordingly the appeal has not been resisted, but, unless the appellant, Mr. Isaacs, succeeds in his contention that the order ought not to have been made, the judgment must stand, whether the petitioner himself takes any personal interest in the result of these apparently futile proceedings or not.

The petitioner originally instructed Messrs. Elvy Robb & Co., but on Nov. 11, 1957, he discharged this firm and instructed as his new solicitor Mr. Isaacs, who took over the papers, giving at the same time a written undertaking to respect the lien of Messrs. Elvy Robb & Co. On Mar. 26, 1958, the petitioner discharged Mr. Isaacs and subsequently instructed his present solicitors. As a matter of history, the petitioner appears to have followed a managing clerk who was at one time with Messrs. Elvy Robb, afterwards with Mr. Isaacs, from whose employment he was discharged in December, 1957, and is now in the employment of Messrs. Adams & Co. The importance of the question of lien is this: Mr. Isaacs asserts that he has a lien on such papers as there are which he is entitled to assert against the petitioner without qualification.

There is no doubt that a solicitor who is discharged by his client during an action otherwise than for misconduct can retain any papers in the cause in his possession until his costs have been paid: see *Re Rapid Road Transit Co.* (1) ([1909] 1 Ch. 96). This rule applies, as the authorities show, whether the client's papers are of any intrinsic value or not; and it would seem that so far as the solicitor's working papers are concerned, where the work has not been paid for by the client, the solicitor would not be compelled to hand over his work unless it had been paid for, apart altogether from the lien. The authorities, however, draw no distinction between any particular class of papers, although, no doubt, the matter has until now only arisen for decision by the courts where there were some valuable or essential documents in question. Such have been held to include deeds, papers or other articles which are the property of the client and have come into the possession of the solicitor in the course of his professional employment, as, for example, a bill of exchange, letters patent, application for shares, a debenture trust deed, a policy of insurance and letters of administration.

The learned judge, however, while recognising the rule as being unqualified where no other parties were interested, held that divorce proceedings were in the same category as actions in which third parties were interested, having regard to the public interest involved, and, therefore, disregarded the lien. It is true, as he said, that divorce affects status and that the public interest is involved; but the fact remains that divorce proceedings inter partes are still civil litigation and we cannot see any compelling reason why the rights of solicitors should differ in such cases from their rights in other cases. The litigant need not change his solicitor without good cause. It would be odd if he were, in effect, able to get solicitors' work done for nothing by the simple expedient of changing his solicitor as often as he chose, leaving a trail of unpaid costs in his wake and demanding the

- A** papers without payment when he had no just cause to complain of the conduct of the solicitors instructed and discarded. If he is hampered in the presentation of his case to his own disadvantage by having changed his solicitors without good cause, the public interest does not require that a litigant who seeks to put away his wife should be in a better position to obtain documents over which the solicitor has a lien than a litigant in any other civil proceedings. It is true that
- B** there is an aspect of public interest which requires a full and complete investigation of the facts in a divorce case, so that, whether or not the opposite party sets up a defence, the court will not grant a decree unless satisfied of certain matters. This duty is now imposed on the court by the Matrimonial Causes Act, 1950, s. 4, and in this respect divorce proceedings differ in a material respect from other civil proceedings. This does not seem to us to involve the necessity of
- C** overriding the lien. It is true that the petitioner may be prevented from producing incriminating documents which would or might imperil his chances of success, such, for example, as correspondence between himself and his wife tending to show that a collusive bargain had been entered into to buy off a defence. In such a situation the petitioner's duty to refer to such documents would remain and he would be unable to produce them until he had satisfied the
- D** claim of his former solicitor. If the judge held that he could not pronounce a decree nisi in such a case, no injustice to the petitioner or the public would result.

As the matter stands, we do not think that there is an existing or potential third-party interest which should override the solicitor's lien. This lien should be preserved in the public interest in order that litigation may be properly conducted with due regard to the interest not only of litigants but also of the officers of the

- E** court who serve those interests.

There is a subsidiary question, since Mr. Isaacs has appealed against that part of the order which purports to relieve him of his undertaking to the first firm of solicitors. We agree with the learned judge that, if the order were to stand, Mr. Isaacs could not be held to have broken his undertaking if he were compelled by the court to hand over papers to the petitioner's latest solicitors. At the same

F time, we think that there cannot be any jurisdiction to relieve Mr. Isaacs of an undertaking given by him to another solicitor. This is not a case where, an undertaking having been given to the court, the undertaker can be relieved by the court itself from complying with the promise given. The appeal is, therefore, allowed.

Appeal allowed.

Solicitors: *Edward Isaacs; Adams & Co.* (for the petitioner).

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*]

FICK AND FICK, LTD. v. ASSIMAKIS.

[COURT OF APPEAL (Lord Evershed, M.R., and Ormerod, L.J.), July 23, 1958.]

Practice—Summary judgment—Specially indorsed writ—Signed by solicitor—Served copy bearing no signature—Appearance entered—Waiver of defective service by defendant—R.S.C., Ord. 3, r. 6 (1), Ord. 14, r. 1 (a), Ord. 19, r. 4. Husband and Wife—Contract by wife—Purchase of goods by wife without informing seller that she intended to buy on behalf of her husband—Leave to defend action by sellers granted under R.S.C., Ord. 14, r. 1, on terms.

The plaintiffs by a specially indorsed writ claimed from the defendant, a married woman, the price of some furniture which she had bought from them without stating, it seemed, that her husband was to be responsible for payment. The indorsement of the writ was signed by the plaintiff's solicitor. The copy of the writ that was served on the defendant was in all respects identical with the original writ save that the copy did not bear the signature. The defendant did not enter an appearance and the plaintiffs signed judgment in default. On the defendant's application, the master set aside the judgment and in his order were the words "Appearance to stand as of today's date". The plaintiffs then applied under R.S.C., Ord. 14, r. 1, for leave to sign final judgment. The defendant contended that since a statement of claim must be signed and that indorsed on the copy of the writ served on her had not been signed she had not appeared "to a writ . . . specially indorsed with . . . a statement of claim" within Ord. 14, r. 1, and that the rule did not therefore apply. The defendant also contended that she had bought the furniture as agent for her husband. On appeal for an order giving her leave to defend on paying into court the amount claimed on the writ,

Held: (i) as the writ which was issued was properly indorsed with a signed statement of claim, the absence of a signature to the statement of claim on the copy served on the defendant was cured by the appearance which the defendant must be taken to have entered.

Cassidy & Co. v. M'Aloon ((1893), 32 L.R.Ir. 368) distinguished.

(ii) the order giving leave to defend if the amount claimed were paid into court should stand, for the defence on the ground that only her husband was liable to the plaintiffs seemed unsubstantial.

Appeal dismissed.

[As to signing of pleadings, see 25 HALSBURY'S LAWS (2nd Edn.) 238, para. 393; and for cases on the subject, see DIGEST (Pleading) 11, 12, 66-79.]

As to special indorsement on writ of summons, see 26 HALSBURY'S LAWS (2nd Edn.) 25, para. 30, note (m); and for cases on the subject, see DIGEST (Practice) 274-277, 90-112.

As to oral contract entered into by married woman, see 19 HALSBURY'S LAWS (3rd Edn.) 855, para. 1398; and for a case on the subject, see 27 DIGEST (Repl.) 175, 1289.]

Case referred to:

(1) *Cassidy & Co. v. M'Aloon*, (1893), 32 L.R.Ir. 368.

Interlocutory Appeal.

This was an appeal by the defendant against an order of GLYN-JONES, J., made in chambers on May 7, 1958. By specially indorsed writ the plaintiffs claimed "£112 8s. for material supplied and work done for the defendant at her request", being the cost of two armchairs and one stool, covered to her order. A copy, or a purported copy, of the writ was served on the defendant but she did not enter an appearance. On Mar. 12, 1958, the plaintiffs obtained judgment in default of appearance. On Apr. 9, 1958, on the defendant's application, Master JACOB set the judgment aside and ordered "Appearance to stand as of today's date". On

- A Apr. 18, 1958, CASSELS, J., dismissed the plaintiffs' appeal against that order. On a summons taken out under R.S.C., Ord. 14, Master JACOB gave the plaintiffs liberty to sign final judgment. On appeal by the defendant, GLYN-JONES, J., by an order dated May 7, 1958, gave the defendant leave to defend if the amount indorsed on the writ should be paid into court within seven days. The amount not having been paid, the plaintiffs signed final judgment on May 15, 1958.
- B The defendant appealed against the order of GLYN-JONES, J. The grounds of appeal were (i) that the plaintiffs were precluded from proceeding under R.S.C., Ord. 14, since "the writ which purported to contain a statement of claim . . . was unsigned by the plaintiffs or by their solicitors or counsel" and (ii) that the evidence before the judge disclosed a good defence or alternatively disclosed such facts as were sufficient to entitle the defendant to defend.
- C *Mark Littman* for the appellants, the defendant.
H. Lester for the respondents, the plaintiffs.

- LORD EVERSHED, M.R.: The action is brought to recover a sum of money, £112 8s., for two articles of furniture. The original writ, bearing the number and figures: 1958 F. No. 252, was issued by the plaintiffs as a specially indorsed writ and complied with all the requirements of such a writ. It bore on the back of it the legend "Statement of Claim", followed by "Particulars", and it was signed by the solicitor for the plaintiffs. The writ was served on the defendant in the ordinary way by handing to her what purported to be a duplicate or copy of the writ. I dare say that the original writ was in the possession of whoever served her and available for her to see if she wanted to see it.
- E The defendant ignored the proceedings at first, and the plaintiffs obtained a judgment in default of appearance and defence. At that stage the defendant wisely took expert advice and consulted a solicitor. The judgment was set aside; but it was obvious that she was in considerable difficulty in applying to have the judgment set aside unless she was prepared to say that she was appearing to the writ. So the order made by Master JACOB on Apr. 9, 1958, was in this form:
- F "It is ordered that the judgment entered in this action and obtained in default of appearance on Mar. 12, 1958, and all subsequent proceedings in this action [which included, I think I am right in saying, proceedings by way of execution] be set aside."

- Then there follow the words: "Appearance to stand as of today's date."
- G An appeal by the plaintiffs from that order was unsuccessful. It, therefore, is made plain that from Apr. 9, 1958 the defendant must be taken to have duly appeared to the writ, which, I repeat, was issued bearing the year, letter and number: 1958 F. No. 252. The plaintiffs, having been somewhat checked on their first advance, then proceeded by way of application for summary judgment under R.S.C., Ord. 14, and the result of that proceeding has been the order now
- H under appeal by GLYN-JONES, J., dated May 7, 1958. That order provides that the plaintiffs should be entitled to recover judgment unless the defendant pays the whole sum stated on the writ, £112 8s., into court within seven days. It was further ordered that if the sum is paid into court, the action will then be transferred to a county court for trial.

- I If the first point which counsel for the defendant has argued is unusual and purely technical, it loses none of its interest for that. He has drawn attention to the rule, particularly the opening language of R.S.C., Ord. 14, r. 1 (a):

"Where the defendant appears to a writ of summons specially indorsed with . . . a statement of claim under Ord. 3, r. 6 . . .";

and he says that in order to sustain GLYN-JONES, J.'s order the plaintiffs must show that the defendant here has appeared to a writ specially indorsed with a statement of claim. That carries you back to the other relevant orders: particularly R.S.C., Ord. 19, r. 4, and R.S.C., Ord. 2, r. 1. I do not propose to read them

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all. It suffices to say that if an indorsement is to be a statement of claim, then it must possess certain characteristics. One is that there should be at the head of the particulars or statement the words "Statement of Claim"; and there is no doubt that those words appear in the copy which we have, and which corresponds to the copy given to the defendant. In addition, by virtue of R.S.C., Ord. 19, r. 4, it is requisite that the statement of claim on the indorsement should be actually signed. It is at this point that the defendant has discerned what might be for her a tabula naufragio, because she says "The thing with which I was served, the copy which I was given, omitted to have on it any signature. Therefore it was not a statement of claim. The indorsement was not a statement of claim, and, therefore, I have not appeared to a writ indorsed with a statement of claim; and you, the plaintiffs, are shut out from any proceeding under R.S.C., Ord. 14, r. 1."

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If that is right, then she is entitled to prevail; although it is to be observed, as counsel for the defendant conceded, that if his client is right, there is no possible means by which the plaintiffs, by amendment or otherwise, can rectify the situation. Notwithstanding the attraction of the argument, I am afraid that I cannot accept it. I think that the answer is really quite short. What has been issued here is the original writ bearing the title: 1958 F. No. 252, the names of the plaintiffs and defendant, and so on, issued out of the Central Office; and it is not in doubt that that writ was a specially indorsed writ in every technical sense, having on the indorsement both the legend "Statement of Claim", and the signature of the solicitor. The only error which has been made is that whoever made the copy which was handed to the defendant was not sufficiently assiduous in his copying work and omitted to copy the solicitor's name in the space provided by the word "Signature". To that extent, therefore, the defendant might say that she was never properly served because the thing which she was given was not a true copy or duplicate of the actual writ. In my judgment, however, she cannot be heard to say that now because she has appeared. She has had to do that for reasons already stated, and I think, therefore, having appeared, she must now be taken to have appeared not to a duplicate writ or somebody's copy of the writ but to the writ itself which is admitted in all respects to be adequate and sufficient. On those grounds I think that the present case cannot be treated as governed by *Cassidy & Co. v. M'Aloon* (1) ((1893), 32 L.R.Ir. 368) where, though this particular point is not precisely stated, it seems to be assumed that the writ, whatever that may mean, was never in truth signed at all. On those grounds, therefore, I reject the first ground of the defendant's appeal.

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There remains the second ground, which counsel has described slightly euphemistically, as based on merits. The facts in regard to this ground may be quite briefly stated. According to the evidence, the defendant went, as many wives do, and ordered the furniture in question. She says in her first affidavit, sworn on Apr. 25, that before going, again as many wives, at any rate, if prudent, do, she consulted her husband and had his support in her excursion. She then went to the premises of the plaintiffs and ordered these articles. She has intimated that the credit, in her view, was given to her husband and not to her, and that she entered into the transaction not as a principal but as agent for her husband. The director of the plaintiff company, Mr. Fick, has produced certain correspondence, and says that he was never told that she was acting on behalf of her husband and that he had no reason to believe that she was. It is true that the letter which is exhibited is, according to the copy, addressed to "Mrs. Assimakis" and begins "Dear Madam". To that extent it must be assumed that the plaintiffs knew that the defendant was or had been married, though it does not show that they knew anything more than that about her domestic affairs. Two other affidavits have been sworn, both bearing the same date, so that the one cannot be by way of answer to the other. It is made plain

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A by the plaintiffs' representative, Mr. Fick, that he treated his customer as being the defendant, Mrs. Assimakis. He wrote to her sending her the account and frequently communicated with her. Subsequently, having been told in January, 1958, as he says, for the first time, that her husband would be responsible, he then proceeded to write, with equal lack of response, to the defendant's husband.

B On the other side, all that the defendant has said—and no doubt she has avoided saying that which is not true—is that she did consult her husband, and at the end of the affidavit she suggests that the plaintiffs should have realised that the real customer was the husband, though she never states that she so informed the plaintiffs.

C Counsel for the defendant has drawn attention to what is stated in 19 HALSBURY'S LAWS (3rd Edn.) at p. 855, and has suggested that, notwithstanding the terms of the Law Reform (Married Women and Tortfeasors) Act, 1935, and s. 1 of that Act in particular*, it is still true to say that a person who deals with somebody to his knowledge being a married woman, may find that he has no recourse against her if it turns out that in fact she was purporting to act as her husband's agent. The passage in HALSBURY is subject to the qualification

D "unless the tradesman has treated her as his debtor", which I think plainly on this evidence appears to have been the attitude of the plaintiffs. I do not want to pre-judge this matter, because it may be that in the end this will indeed be the only possible refuge for the defendant. I confine myself accordingly to saying that if there is here to be found some defence, it seems to me on the evidence as

E it at present stands to be of a somewhat unsubstantial character. At any rate, I am clear in my own mind that it is not sufficiently established to justify this court in interfering with the view taken in his discretion by the judge below that the right order here to make was that if she should have leave to defend, it must be on terms that this relatively small sum of money should be in its entirety paid into court. For those reasons, therefore, I would dismiss the appeal.

F FORMEROD, L.J.: I agree and there is nothing I wish to add.

Appeal dismissed.

Solicitors: *Lucien Fior* (for the defendant); *Hall, Brydon* (for the plaintiffs).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

* 11 HALSBURY'S STATUTES (2nd Edn.) 811.

**BULLOCK (INSPECTOR OF TAXES) v.
UNIT CONSTRUCTION CO., LTD.**

[CHANCERY DIVISION (Wynn-Parry, J.), July 15, 16, 17, 22, 1958.]

Income Tax—Residence—Company—Place where management and control is exercised—Subsidiary company in East Africa—Parent company in fact exercising central management and control in London—Finance Act, 1953 (1 & 2 Eliz. 2 c. 34), s. 20 (9).

Three companies were incorporated and registered in Kenya and carried on business there. The members of their boards of directors were resident there, and by their articles of association the board meetings and general meeting of the companies could be held anywhere except in the United Kingdom. Their articles of association placed the control of their businesses in the hands of their directors. The companies were subsidiaries of an English company and, following losses sustained by the subsidiaries, the directors of the parent company in London decided to take over management and control of the companies. Thereafter the directors of the subsidiary companies were elected and, if occasion arose, were removed on the instructions of the directors of the parent company; the minutes of the meetings of the directors of the subsidiaries recorded only formal matters and occasionally the implementation of decisions of the directors of the parent company, and the directors of the subsidiaries were not summoned to meetings nor did they sit or take any decision as a board. They did not manage and control the businesses of their companies and would have been removed from office if they had tried to do so, and they had no greater authority than other senior employees. The directors of the parent company dictated the whole of the trading policy of the subsidiary companies, including the level of production, financial control and management and even made decisions on minor matters. In the computation of the profits of an English subsidiary of the parent company the subsidiary (the respondent) sought to deduct, under s. 20 of the Finance Act, 1953, payments made to the African subsidiary companies as subvention payments to associated companies, viz., by definition in s. 20 (9) companies resident in the United Kingdom.

Held: the test by which to determine the place of residence of a company was where, according to its constitution, the controlling power and authority over it and the exercise of that power and authority were in some substantial degree to be found; since this power and authority was invested according to the articles of association of the African subsidiary companies (though not in fact) in the boards of directors of those companies, the place of residence of the companies was East Africa, and, therefore, s. 20 of the Finance Act, 1953, was inapplicable by reason of sub-s. (9) and the payments were not deductible for tax purposes.

Dictum of SIR RAYMOND EVERSLED, M.R., in *Union Corpn., Ltd. v. Inland Revenue Comrs.* ([1952] 1 All E.R. at p. 657), and *Stanley v. Gramophone & Typewriter, Ltd.* ((1908), 5 Tax Cas. 358) applied.

Appeal allowed.

[As to residence of a company for income tax purposes, see 20 HALSBURY'S LAWS (3rd Edn.) 302, para. 552, 395, para. 723; and for cases on the subject, see DIGEST SUPP.]

For the Finance Act, 1953, s. 20 (9), see 33 HALSBURY'S STATUTES (2nd Edn.) 123.]

Cases referred to:

- (1) *Swedish Central Ry. Co., Ltd. v. Thompson*, [1925] A.C. 495; 94 L.J.K.B. 527; 133 L.T. 97; 9 Tax Cas. 342; 28 Digest 28, 144.
- (2) *De Beers Consolidated Mines, Ltd. v. Howe*, [1906] A.C. 455; 75 L.J.K.B. 858; 95 L.T. 221; 5 Tax Cas. 198; 28 Digest 30, 155.

- A** (3) *Cesena Sulphur Co. v. Nicholson, Calcutta Jute Mills v. Nicholson*, (1876), 1 Ex.D. 428; 45 L.J.Q.B. 821; 35 L.T. 275; 1 Tax Cas. 83, 88; 28 Digest 25, 136.
- (4) *Gramophone & Typewriter, Ltd. v. Stanley*, [1908] 2 K.B. 89; 77 L.J.K.B. 834; 99 L.T. 39; sub nom. *Stanley v. Gramophone & Typewriter, Ltd.*, 5 Tax Cas. 358; 28 Digest 30, 153.
- B** (5) *Automatic Self-Cleansing Filter Syndicate Co., Ltd. v. Cuninghame*, [1906] 2 Ch. 34; 75 L.J.Ch. 437; 94 L.T. 651; 9 Digest (Repl.) 498, 3282.
- (6) *Union Corpn., Ltd. v. Inland Revenue Comrs., Johannesburg Consolidated Investment Co., Ltd. v. Inland Revenue Comrs., Trinidad Leaseholds, Ltd. v. Inland Revenue Comrs.*, [1952] 1 All E.R. 646; *affd.* H.L., [1953] 1 All E.R. 729; [1953] A.C. 482; 34 Tax Cas. 207; 3rd Digest Supp.
- C** (7) *Koitaki Para Rubber Estates, Ltd. v. Federal Comr. of Taxation*, (1940), 64 C.L.R. 15, 241.

Case Stated.

D The taxpayers appealed to the Special Commissioners of Income Tax against assessments to income tax made on them under Case I of Sch. D to the Income Tax Act, 1952, for 1953-54 in the sum of £110,000 less £36,388 capital allowances and for 1954-55 in the sum of £200,000 less £50,000 capital allowances. The appeal concerned payments made by the taxpayers which they claimed to deduct in computing their profits for the purposes of the assessments as follows: £15,000 paid to Booth & Co. (Africa), Ltd., in 1952; £8,000 paid to Booth & Co. (Africa), Ltd., in 1953; £29,000 paid to Booth & Co., Ltd., in 1952; £27,500 paid to Booth & Co., Ltd., in 1953; £33,000 paid to Bulleys Tanneries, Ltd., in 1952; £11,500 paid to Bulleys Tanneries, Ltd., in 1953. The sole question in dispute was whether the three companies receiving the payments were companies resident in the United Kingdom in 1952 and 1953 within the meaning of s. 20 (9) of the Finance Act, 1953. It was common ground that, if they were so resident, the payments were subvention payments which the taxpayers were entitled to deduct in computing their profits under s. 20.

E The taxpayers and the three companies, the African subsidiaries, were wholly owned subsidiaries of the parent company, Alfred Booth & Co., Ltd. It was admitted by the taxpayers that the African subsidiaries were at all material times resident in East Africa. Alfred Booth & Co., Ltd. were a company incorporated and resident in England and were the parent of a group of ten or more companies trading in many parts of the world. They were incorporated in 1914 to carry on banking, merchanting and manufacturing businesses of all descriptions and they carried on a number of businesses in different parts of the world (including in particular building contracting, and businesses connected with the leather industry), all of which by August, 1949, they had transferred to subsidiary companies incorporated for the purpose. In August, 1949, they adopted a new memorandum of association, with the objects of an investment trust company, with power to carry on the business of banking. Their board of directors met regularly in London, and a committee of executive directors held weekly meetings in London, at which matters relating to the affairs of various subsidiary companies were considered from time to time.

H The African subsidiaries were incorporated in 1948 and 1949 and carried on various businesses in East Africa, and in particular in Uganda, Mombasa and Kenya. Each of them was incorporated in Kenya under the Kenya Companies Ordinance and had its registered office in Nairobi. The articles of association of each of them contained provisions placing the management and control of their business in the hands of its directors and providing that directors' meetings might be held anywhere outside the United Kingdom. It was the intention of the directors of the parent company (which intention they thought they had carried out) in forming the African subsidiaries that those companies should be solely

resident in Africa in order that their profits could be used for development in Africa without becoming liable to United Kingdom taxation and also to forestall any question which might arise in connexion with any future nationalisation, particularly of the building industry. Owing to the disturbances in Kenya and other difficulties they incurred losses, and this was a source of considerable anxiety to the parent company which had sunk considerable sums of money in them. The directors of the parent company decided that, as a result of the lack of success of the African subsidiaries, they were forced to take over management and control in order to save their company's investment; at the same time it was their policy to dispose of all or any of the African subsidiaries' undertakings if the opportunity arose.

There was at no time any formal agreement with the African subsidiaries that the directors of the parent company should manage them, but the directors' intention was communicated to Mr. P. Meinertzhagen, the chairman of the board of each of the African subsidiaries, and was accepted by him. As a result, from 1950 onwards, the directors of the parent company in London began to intervene in the affairs of the African subsidiaries. They were aware that their action might affect the question of the residence of the African subsidiaries and their liability to United Kingdom taxation.

The financial stake of the parent company in the African subsidiaries on Dec. 31, 1952, was shown by the following figures relating respectively to Booth & Co. (Africa), Ltd., Booth & Co., Ltd., and Bulleys Tanneries, Ltd.; Shareholding £50,000, £50,000, £125,000; loans £105,000, £120,000, £12,500; current account (Booth & Co. (Africa), Ltd.) £26,464; guaranteed bank overdraft £138,624, £126,291, £58,803; accumulated losses £96,831, £73,940, £76,870.

Mr. Meinertzhagen, the chairman of the directors of each of the African subsidiaries, a former employee of the parent company, but not at any material time a director, had no contract of service with any company in the group and was remunerated by a salary paid by Booth & Co., Ltd., of which part was refunded by the other African subsidiaries. He was described in correspondence and in staff lists as "Alfred Booth & Co., Ltd.'s senior representative in East Africa". The other directors of the African subsidiaries were employed by and held contracts of service with their companies. Only one was a director of more than one company. All the directors were elected to the boards on the instructions of the parent company and their contracts of service were made in London by the parent company, as agents for the African subsidiary concerned. None was a director of the parent company. When occasion arose for removing such a director, the decision to determine his contract of service and remove him was taken in London by the directors of the parent company, who issued instructions to that effect to Mr. Meinertzhagen. Any question of compensating a director as member of the staff of the African subsidiaries for removal or dismissal was dealt with by the directors of the parent company, who used Mr. Meinertzhagen as an intermediary or one of whom (once) flew to East Africa to negotiate terms.

The directors of the African subsidiaries did not all have access to all the documents of or information concerning their companies. The minutes of their meetings, held on irregular dates, recorded only formal business or in a few instances the implementation of decisions on more important business which had been taken by the directors of the parent company in London. Mr. Meinertzhagen was recorded as present at each such meeting with one or two other directors, but in many cases the directors recorded as being present had not actually met and might not have known of the meeting, since they were not notified as a rule; but a meeting did take place when a director of the parent company was recorded as having been in attendance. Minutes of meetings before 1952 were written up in 1952 from typed records kept loose in a book by previous company secretaries, to comply with the law on the instructions of the

A directors of the parent company. In most cases the business recorded was transacted by Mr. Meinertzhagen (in all matters of any importance on the instructions of the parent company), and the minute was written afterwards. In no cases did the directors of any of the African subsidiaries sit round a table as a board and they never took any decision as a board, met as a board or were summoned to meet as a board. They did not and for all practical purposes could not manage

B and control the businesses of their companies. If they had tried to do so otherwise than in accordance with the instructions of the directors of the parent company that company would have removed them from office.

The whole of the trading policy of the African subsidiaries was dictated by the board of directors of the parent company and was implemented by Mr. Meinertzhagen as their senior representative and as chairman of the African subsidiaries.

C On occasion Mr. Meinertzhagen was consulted before a decision was taken and from time to time he made submissions to the parent board on behalf of the African subsidiaries which were taken into account in determining future policy. On occasion a visiting director of the parent company consulted the local directors on the spot before deciding what he wanted to do.

D At no time was the name of the parent company or of any of their directors included in the register of directors of any of the African subsidiaries kept in accordance with art. 145 of the Kenya Companies Ordinance, notwithstanding provision there for registration of a corporation as director or manager, and the requirement that

E "a person in accordance with whose directions or instructions the directors of a company are accustomed to act shall be deemed to be a director and officer of the company."

Every aspect of the businesses carried on by the African subsidiaries was under scrutiny by the executive directors of the parent company at their weekly meetings in London. They were kept informed by weekly financial statements, monthly trading statements and other periodical statements from the African subsidiaries, by regular interchange of letters between Mr. Meinertzhagen and

F Mr. J. W. Booth, the chairman of directors and one of their managing directors, who was responsible for the general trading and mining interests of the African subsidiaries, and by visits by executive directors to Africa.

The directors of the parent company concerned themselves with the level of trading activities of the African subsidiaries, economies and re-arrangement of local branches and varying the level of production to meet trade difficulties, preventing overstocking and overtrading, facilities by one company to another, and the scale and place of future operations of building activities. They required submission of all contracts of one company above a certain value to them for approval. They kept a tight control of finance, both of bank borrowings and of inter-company financial arrangements, and negotiated bank overdraft limits

G with the bankers and themselves from time to time imposed lower limits. They paid careful attention to management with the aim of having a single efficient executive arm in East Africa capable of exercising day-to-day management of all the East African subsidiaries which could be relied on to implement their policy decisions without the necessity for frequent visits by them. Day-to-day management of the undertakings in 1952 and 1953 was broadly supervised by

H Mr. Meinertzhagen, who was responsible for local management within the instructions and limitations imposed by the parent company.

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A mining venture of Booth & Co. (Africa), Ltd. was almost entirely managed from London, and was financed entirely by the parent company. The parent company acting as agents for Booth & Co., Ltd. negotiated with an outside company an agreement under which Booth & Co., Ltd. disposed of most of their hides, and also negotiated variations of the commission payable to Booth & Co., Ltd. The outside company dealt directly with Booth & Co., Ltd. in the day-to-day working of the agreement but Booth & Co., Ltd.'s purchasing organisation

was controlled on policy matters by the directors of the parent company. A Negotiations (abortive) for the sale of a tannery and a mine were mainly carried out by Mr. Meinertzhagen on their instructions. The directors also constantly made decisions on minor matters such as rates of commission (inter-company) to be charged for facilities, authority to sell goatskins "short", closing of a branch and reduction of staff, buying land for a warehouse and sales arrangements. B The staff and officials of the African subsidiaries made decisions on the day-to-day running of the trading activities within the general policy directions of the directors of the parent company. In this connexion, except for Mr. Meinertzhagen and for a short time one other director, the directors of the African subsidiaries were not found to have any greater authority, either as individuals or as boards, than other senior employees, and there was no evidence that they ever acted or tried to act as boards. C

The taxpayers contended that each of the African subsidiaries was resident in the United Kingdom within s. 20 (9) of the Finance Act, 1953, and that the taxpayers were accordingly entitled to deduct the payments made to the subsidiaries. The Crown contended that none of the African subsidiaries was resident in the United Kingdom and the taxpayers were not entitled to the deductions claimed. D The commissioners found that the boards of directors of the African subsidiaries were standing aside in all matters of real importance and in many matters of minor importance affecting the central management and control and that the real control and management was being exercised by the board of directors of the parent company in London. They also found that the controlling power and authority, which according to the constitution of each of the African subsidiaries was vested in its board of directors, was actually exercised to a very substantial degree by the board of the parent company in London. E They held that, once that was found as a fact, it was not necessary to go further and inquire whether such power and authority was exercised under the constitution of the company concerned by the officers to whom such constitution gave it; and they held that each of the African subsidiaries was resident in the United Kingdom in 1952 and 1953. F They reduced the assessments to £46,546 (less £37,110 capital allowances) for 1953-54, and to £163,477 (less £54,712 capital allowances) for 1954-55. The Crown appealed.

Roy Borneman, Q.C., and A. S. Orr for the Crown.

Heyworth Talbot, Q.C., and J. L. Creese for the taxpayers.

Cur. adv. vult.

July 22. **WYNN-PARRY, J.:** In para. 2 (2) of the Case the Special Commissioners rightly pose the question as follows:

"The sole question in dispute was whether Booth & Co. (Africa), Ltd., Booth & Co., Ltd., and Bulleys Tanneries, Ltd., were in 1952 and 1953, companies resident in the United Kingdom within the meaning of s. 20 (9) of the Finance Act, 1953."

In para. 4 of the Case the Special Commissioners say:

"It was admitted on behalf of [the taxpayers] that the African subsidiaries were at all material times resident in East Africa."

Counsel for the taxpayers submitted that I should give no colour to that admission, because it could not be said with precision what were the grounds on which it was made or how far it was intended to go. I cannot accept this submission. A study of the Case convinces me that the admission was not only proper, but inevitable. In my view, if it had been contended that the African subsidiaries were not resident in East Africa, the Special Commissioners would have been bound to find that they were resident in East Africa for taxation purposes. Not only were all those companies registered in East Africa, but they carried on business there; the members of the respective boards were resident I

A there; and the articles of association provided in each case that the board meetings and general meetings of the company concerned could be held anywhere except in the United Kingdom. In short, every necessary step was taken to ensure that, having regard to the state of the authorities, if the residence of the African subsidiaries should become a material matter for consideration, the inevitable conclusion would be that they were each resident in East Africa.

B The next, and indeed the main, submission put forward by counsel for the taxpayers was that, as the Special Commissioners held, the African subsidiaries were also resident in the United Kingdom over the material period. As will be seen from the careful and exhaustive statement of the evidence on behalf of the taxpayers, which the Special Commissioners accepted, the board of directors of Alfred Booth & Co., Ltd. (the parent company), in effect told the boards of the African

C subsidiaries what to do, and those boards accepted the instructions and acted accordingly. In those circumstances, it is argued that the reality of the matter is that the real business of these companies is carried on in the United Kingdom as being the country where the central management and control abided. It is accepted by counsel for the taxpayers that this argument involves going further than any authority to be found in the books.

D I do not intend to multiply reference to authority, but I would say this. Speaking broadly, prior to *Swedish Central Ry. Co., Ltd. v. Thompson* (1) ((1925), 9 Tax Cas. 342), the courts were concerned with cases in which the dispute was as to which of two or more alleged places was to be regarded as the place where the company concerned was to be regarded as resident. No question of dual residence arose. It is against that background that the cases prior to the *Swedish Railway*

E case (1) have to be considered.

In *De Beers Consolidated Mines, Ltd. v. Howe* (2) ((1906), 5 Tax Cas. 198) LORD LOREBURN, L.C., said (*ibid.*, at p. 212):

“ Mr. Cohen propounded a test which had the merits of simplicity and certitude. He maintained that a company resides where it is registered and nowhere else. If that be so, the appellant company must succeed, for it is registered in South Africa. I cannot adopt Mr. Cohen's contention. In applying the conception of residence to a company, we ought, I think, to proceed as nearly as we can upon the analogy of an individual. A company cannot eat or sleep, but it can keep house and do business. We ought, therefore, to see where it really keeps house and does business. An individual may be of foreign nationality, and yet reside in the United Kingdom. So may a company. Otherwise, it might have its chief seat of management and its centre of trading in England, under the protection of English law, and yet escape the appropriate taxation by the simple expedient of being registered abroad and distributing its dividends abroad. The decision of KELLY, C.B., and HUDDLESTON, B., in *Cesena Sulphur Co. v. Nicholson, Calcutta Jute Mills v. Nicholson* (3) ((1876), 1 Ex.D. 428), now thirty years ago, involved the principle that a company resides, for purposes of income tax, where its real business is carried on. Those decisions have been acted upon ever since. I regard that as the true rule; and the real business is carried on where the central management and control actually abides.”

I I desire to lay emphasis on the reasoning of LORD LOREBURN which led him to state the rule as he did in the passage which I have quoted. It is, I think, to be found in the words:

“ Otherwise, it might have its chief seat of management and its centre of trading in England, under the protection of English law, and yet escape the appropriate taxation by the simple expedient of being registered abroad and distributing its dividends abroad.”

When LORD LOREBURN says “ its chief seat of management ”, he must mean “ the company's chief seat of management ”, and not the seat of management of

any other company: in other words "the chief seat of management as set up within the constitution of the company". If that be the true implication to be drawn from LORD LOREBURN'S words, then *De Beers Consolidated Mines, Ltd. v. Howe* (2) does not help counsel for the taxpayers. A

To my mind, however, the matter does not rest on mere implication. There are two authorities, both Court of Appeal decisions, which I regard as negating the proposition which counsel for the taxpayers puts forward, and as supporting the view that, in order that a company resident abroad can claim the benefit of residence in this country, it must be shown that the acts relied on as constituting such residence were done within its constitution. If they were not so done, they are not the acts of the company, and are not to be taken into consideration. B

The first of the two authorities is *Stanley v. Gramophone & Typewriter, Ltd.* (4) ((1908), 5 Tax Cas. 358). In that case the company held all the shares in a German subsidiary. The German subsidiary was not shown to be a mere simulacrum of the English company, the mere existence of a power of ultimate control not being held sufficient to lead to such a conclusion. In the course of his judgment SIR H. H. COZENS-HARDY, M.R., said (*ibid.*, at p. 374): C

"The German company was established in Germany in 1900 in accordance with German law. It was undoubtedly a company with several shareholders who brought in considerable capital. One of those shareholders was an English company, whose undertaking was subsequently acquired by the present English company. At some date which is not stated, the English company acquired all the shares of the German company, and I assume in favour of the Crown that this event had happened before the material dates. The fact that an individual by himself or his nominees holds practically all the shares in a company may give him the control of the company in the sense that it may enable him, by exercising his voting powers, to turn out the directors and to enforce his own views as to policy, but it does not in any way diminish the rights or powers of the directors, or make the property or assets of the company his as distinct from the corporation's. Nor does it make any difference if he acquire not practically the whole, but absolutely the whole of the shares. The business of the company does not thereby become his business. He is still entitled to receive dividends on his shares, but no more. I do not doubt that a person in that position may cause such an arrangement to be entered into between himself and the company as will suffice to constitute the company his agent for the purpose of carrying on the business, and thereupon the business will become for all taxing purposes his business. Whether that consequence follows is in each case a matter of fact. In the present case I am unable to discover anything, in addition to the holding of the shares, which in any way supports this conclusion. The German company was not at first, and there is no evidence that it has ever become, a sham company or a mere cloak for the English company. It has its board of management and its board of supervision as required by the German law. Its accounts are made out in accordance with German law. On the other hand, the English company has its board of directors, some of whom are on the German board. It has a proper account and balance sheet in which its interest in the German company is described accurately as so many shares in the German company, and the gross profits of the German company are in no way brought into the profit and loss account of the English company. Against this the only thing to be said is that the chairman of the English company made a foolish speech in which he treated the gross profits of the German company as profits of the English company; but the dividend declared by the English company did not proceed upon this footing. In my opinion it would be wrong to attribute to the loose and inaccurate language of the chairman a force sufficient to D

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A override the formal acts of both the English company and the German company and all the other circumstances of the case.”

BUCKLEY, L.J., in a well-known passage said (5 Tax Cas. at p. 381):

B “Further, it is urged that the English company as owning all the shares can control the German company, in the sense that the German company must do all that the English company directs. In my opinion this again is a misapprehension. This court decided not long since in *Automatic Self-Cleansing Filter Syndicate Co., Ltd. v. Cuninghame* (5) ([1906] 2 Ch. 34) that even a resolution of a numerical majority at a general meeting of the company cannot impose its will upon the directors when the articles have confided to them the control of the company’s affairs. The directors are not servants to obey directions given by the shareholders as individuals; they are not agents appointed by and bound to serve the shareholders as their principals. They are persons who may, by the regulations, be entrusted with the control of the business, and if so entrusted they can be dispossessed from that control only by the statutory majority which can alter the articles. Directors are not, I think, bound to comply with the directions even of all the corporators acting as individuals. Of course the corporators have it in their power by proper resolutions, which would generally be special resolutions, to remove directors who do not act as they desire, but this in no way answers the question here to be considered which is, whether the corporators are engaged in carrying on the business of the corporation. In my opinion they are not. To say that they are involves a complete confusion of ideas.

E The inquiry may be put in another form by asking who would be liable upon the contracts of the German company? Obviously the German company, and not those who are the holders of its shares.”

The second authority is *Union Corpn., Ltd. v. Inland Revenue Comrs.* (6) ([1952] 1 All E.R. 646). In this case Sir RAYMOND EVERSHED, M.R., gave the judgment of the court and, after an exhaustive review of the authorities, laid down a test for ascertaining whether or not it could be postulated of a company that it was resident in more than one place. It is true that, strictly speaking, his judgment on this point was obiter, but, given as it was after so much careful consideration, I should feel myself bound to accept it, apart from the circumstance that, if I may say so with respect, I wholly agree with it. I need cite only one passage which is set out (*ibid.*, at p. 657):

G “The company may be properly found to reside in a country where it ‘really does business’, that is to say, where the controlling power and authority which, according to the ordinary constitution of a limited liability company, is vested in its board of directors, and the exercise of that power and authority, is to some substantial degree to be found. In our judgment, the formula ‘where the central power and authority abides’ does not demand that the court should look and look only to the place where is found the final and supreme authority. We have on this difficult question derived great assistance from the judgment of Sir OWEN DIXON, J., in the Australian case of *Koitaki Para Rubber Estates, Ltd. v. Federal Comr. of Taxation* (7) ([1940], 64 C.L.R. 15, 241), where the same problem was fully considered by that learned judge and by the full High Court of Australia. We cite one paragraph from DIXON, J.’s judgment (64 C.L.R. at p. 19): ‘The better opinion, however, appears to be that a finding that a company is a resident of more than one country ought not to be made unless the control of the general affairs of the company is not centred in one country but is divided or distributed among two or more countries. The matter must always be one of degree and residence may be constituted by a combination of various factors, but one factor to be looked for is the existence in the place claimed as a residence of some part of the superior or directing authority by means

of which the affairs of the company are controlled'. We accept and respectfully adopt that passage as accurately stating the solution of the problem." A

In my view this passage is conclusive of the question before me. In the first place, the words of the Master of the Rolls,

"that is to say, where the controlling power and authority which, according to the ordinary constitution of a limited liability company, is vested in its board of directors, and the exercise of that power and authority, is to some substantial degree to be found", B

indicate to my mind that he was contemplating only an exercise of authority which could properly be exercised within the framework of the constitution of the company concerned. This conclusion is, I think, inevitable when one considers the phrase used by DIXON, J., "the superior or directing authority". C In that context "authority" must have a narrower meaning than "power". It must connote something which has been regularly established, and because of that regular establishment is entitled and able to exercise direction. To my mind, the board of the parent company cannot fall within the phrase "superior or directing authority". As such it has no authority over the boards of the African subsidiaries. True, those boards may accept the instructions of the board of the parent company; but they are not bound to do so. It may be that they do accept instructions, because failure to do so would result in dismissal, but acceptance in fact of such instructions does not mean that the board of the parent company has authority to give the instructions. As I have said, it has no such authority. It must follow, to my mind, that in applying the test adumbrated by the Master of the Rolls no weight or attention can be given to the activities of the board of the parent company in relation to the taxpayers and the African subsidiaries for the purpose of considering whether or not any of them are resident in the United Kingdom. In the result it cannot be said that any part of the superior and directing authority of these companies exists in the place claimed as a residence, namely, the United Kingdom. Further, even if "authority" could be regarded as being synonymous with "power", the word "power" in the context would have to be read as "power regularly exercised". D E F

If I have, as I hope is the case, rightly understood the test propounded by the Master of the Rolls, then there is furnished for the guidance of those interested in these matters a test clearly defined in its scope (and founded, if I may say so, on principles of common sense), with the result that certainty is achieved, the only possible difficulty (though hard to foresee) being in its application in a given case. If, on the other hand, the proposition of counsel for the taxpayers were to be accepted, certainty goes, and the court would have to take into consideration, as material statements for the purpose of answering such a question as is posed here, acts (in this case the acts of the board of the parent company) which, on the reasoning in the *Gramophone* case (4), must be regarded as irregular interference by a parent company in the affairs of a subsidiary. G H

In the result, in my view, the appeal succeeds and must be allowed with costs.

Appeal allowed.

Solicitors: *Solicitor of Inland Revenue; Herbert Smith & Co.* (for the taxpayers).

[Reported by F. A. AMIES, ESQ., Barrister-at-Law.]

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WILSON v. WILSON.

[BIRMINGHAM ASSIZES (Karminski, J.), July 15, 16, 1958.]

Divorce—Practice—Trial—Allegation of cruelty—Submission of no case to answer—Whether counsel should be put to election whether to call or not to call evidence.

B

It is the practice of the Divorce Division to put counsel, who makes a submission that there is no case to answer, to his election whether to call or not to call evidence; and, though the court has a discretion not to put counsel to his election, this discretion should be exercised only sparingly and in exceptional circumstances (see p. 196, letter G, post).

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Gilbert v. Gilbert & Abdon (Adams intervening) ([1957] 3 All E.R. 604), and *Lance v. Lance & Gardner* ([1958] 1 All E.R. 388) distinguished.

[As to submission in divorce suit of no case to answer, see 12 HALSBURY'S LAWS (3rd Edn.) 387, para. 852, note (e); and for cases on the subject, see 27 DIGEST (Repl.) 544, 4921 and Supplements.]

Cases referred to:

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(1) *Alexander v. Rayson*, [1935] All E.R. Rep. 185; [1936] 1 K.B. 169; 105 L.J.K.B. 148; 154 L.T. 205; Digest Supp.

(2) *Yuill v. Yuill*, [1945] 1 All E.R. 183; [1945] P. 15; 114 L.J.P. 1; 172 L.T. 114; 27 Digest (Repl.) 544, 4921.

(3) *Gilbert v. Gilbert & Abdon (Adams intervening)*, [1957] 3 All E.R. 604; 3rd Digest Supp.

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(4) *Lance v. Lance & Gardner*, [1958] 1 All E.R. 388.

(5) *Salmon v. Salmon*, (Birmingham Assizes, Mar. 20, 21, 1958), unreported.

Petition.

This was a petition by the wife for a divorce on the ground of the husband's cruelty. The husband denied the charge of cruelty. At the conclusion of the wife's case, counsel for the husband stated that he desired to submit that there was no case for the husband to answer, and contended that he was entitled to make this submission without being put to his election whether or not to call evidence. The case is reported solely on the judge's ruling on this point.

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M. E. Holdsworth for the wife.

A. W. M. Davies for the husband.

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KARMINSKI, J.: I shall first deal with the preliminary submission made by counsel for the husband, that he is entitled in this case to make a submission of no case to answer at the conclusion of the wife's case, without himself being put to the election whether or not to call evidence.

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The practice in this Division on that matter has, I think, to some extent changed in the last quarter of a century. It was at once conceded by counsel for the wife in opposing the submission of counsel for the husband, that there is a discretion in the court to abstain from putting counsel who makes the submission to his election, because the matter is one of practice only and is not a rule of law. Counsel for the wife has argued with force, however, that though it is only a matter of practice, it should not be departed from except in exceptional circumstances. I want to refer briefly to the practice in this Division. I believe the true position to be as follows. Before the decision in *Alexander v. Rayson* (1) ([1935] All E.R. Rep. 185) there was some doubt whether in matrimonial suits counsel submitting no case to answer should or should not be put to his election to call no evidence. After that decision it became the general practice that counsel should be put to his election before making his submission, though the court retained its discretion to refrain from putting counsel to his election. In 1944 there came before the Court of Appeal a matrimonial suit, *Yuill v. Yuill* (2) ([1945] 1 All E.R. 183). Both the facts of that case and the issues were very

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different from the present case. The charge in the petition in that case was adultery. LORD GREENE, M.R., said this ([1945] 1 All E.R. at p. 185):

"The practice which has been laid down amounts to no more than a direction to the judge to put counsel who desires to make a submission of no case to his election and to refuse to rule unless counsel elects to call no evidence. Where counsel has so elected he is, of course, bound . . ."

Then LORD GREENE dealt with what had arisen in that particular case.

There the matter seems to have rested until quite recently, where in two decisions of this Division, one by SACHS, J., and the other by Mr. Commissioner LATEY, Q.C., it was decided that counsel could be allowed to make a submission of no case without being put to his election; see *Gilbert v. Gilbert & Abdon (Adams intervening)* (3) ([1957] 3 All E.R. 604), and *Lance v. Lance & Gardner* (4) ([1958] 1 All E.R. 388). Both those cases differ from the present case in that they related to the position of a co-respondent or an intervener when charges of adultery were made. Both the learned judge and the learned commissioner referred to s. 5 of the Matrimonial Causes Act, 1950*, which deals expressly with the position in petitions on the grounds of adultery in relation to dismissing the co-respondent or the intervener from the suit where there is not sufficient evidence against him or her; but so far as counsel have by their researches been able to ascertain, it was not until the last assizes here in March that counsel was allowed to make a submission without being called on to elect. That was a case, not reported, called *Salmon v. Salmon* (5), which was tried by BARNARD, J., at these assizes, on Mar. 20, 21, 1958. That was a husband's petition on the grounds of cruelty. At the end of the husband's case it was submitted by Mr. Davies, who appeared both in that and in the present case, that there was no case to answer. After some discussion and some argument BARNARD, J., ruled that he was not in that case bound to put counsel to his election.

Unfortunately I have no record of the observations of BARNARD, J., but I am informed by Mr. Davies—and of course I accept it at once—that they were quite brief, and that there was in fact no very full argument. I must not for one moment assume that with his very long and close experience of the practice in this Division BARNARD, J., was not aware of the decided cases; but he did not have the advantage, which I have had, of listening to a full and very helpful argument by both counsel. I pay the very closest attention to any decision of BARNARD, J., but I think that I ought not, in a case of this kind, to depart from the well-established practice of this Division, now maintained for over twenty years, that counsel in making a submission must be put to his election. There is, as counsel for the wife at once admitted, a discretion; but I am satisfied that that discretion should be sparingly exercised, and then only in quite exceptional circumstances. There are not, as I see it, any exceptional circumstances in this case, except that I thought it right to say, at the conclusion of the wife's case, that I felt it was a very weak case of cruelty, on the evidence. Having heard the arguments, I have come to the conclusion that this is a case where I ought to follow the usual practice and to put counsel for the husband to his election.

Rule accordingly.

Solicitors: *Blackham, Maycock & Hayward*, Birmingham (for the wife); *Charles C. Ladds*, Birmingham (for the husband).

[Reported by MISS GWYNEDD LEWIS, Barrister-at-Law.]

A DUNLOP RUBBER CO., LTD. v. LONGLIFE BATTERY DEPOT
(A FIRM).

[CHANCERY DIVISION (Lloyd-Jacob, J.), July 21, 22, 23, 24, 31, 1958.]

B *Patent—Licence—Restrictive condition—Price maintenance—Retailer obtaining supplies of patented article from licensee—Sale by retailer at less than fixed price—Knowledge of condition as to price—Infringement of patent by retailer.*

Restrictive Trade Practices—Price maintenance—Sale by retailer below fixed price—Purchase of article by retailer before operation of Restrictive Trade Practices Act, 1956, s. 25—Restrictive Trade Practices Act, 1956 (4 & 5 Eliz. 2 c. 68), s. 25 (1).

C In the course of his retail business the defendant offered for sale and sold on Dec. 5, 1956, at less than the list price a motor car tyre manufactured by the plaintiffs under letters patent. Each such tyre bore an embossed reference to manufacture under letters patent. The plaintiffs imposed on suppliers of their tyres "conditions of licence" under written agreements. **D** These conditions included a condition that no advertisement, public offer for sale, sale or supply of tyres should be made to a retail customer at a price higher or lower than the price appearing in the plaintiffs' current price list. The defendant acquired the tyre before November, 1956, from such a supplier for the purpose of retail sale and he was aware (at the date of such acquisition) that tyres of the plaintiffs' manufacture could only reach him **E** from suppliers who had bound themselves to the plaintiffs to observe the price restrictive conditions. One of the patents (No. 588,170) under which the tyre was manufactured claimed a monopoly in tyres so manufactured. Before the date of the sale the defendant had received by direct communication from the plaintiffs notice of the conditions of licence and that sale otherwise than in accordance with the conditions would be regarded **F** as an infringement of letters patent. He had also at that date received notice of letters patent No. 588,170. The purchaser of the tyre was an agent of the plaintiffs and purchased on their instructions. The plaintiffs claimed an injunction to restrain the defendant from infringing letters patent No. 588,170 by offering for sale and selling their tyres otherwise than in accordance with their conditions, and they relied on the Restrictive Trade Practices Act, 1956, s. 25 (1), which came into force on Nov. 2, 1956. **G**

H **Held:** (i) the offer and sale by the defendant constituted an infringement of letters patent No. 588,170 because he bought with knowledge of the conditions under which his supplier was authorised to deal in the tyres, and, therefore, was bound by such conditions (*Incandescent Gas Co., Ltd. v. Brogden*, (1899), 16 R.P.C. 179, applied); and it was not necessary for the plaintiffs to establish that the defendant had, at the date of his acquiring the tyre, been made aware of the existence of patent protection, nor, as the purchase of the tyre by the plaintiffs' agent was made in the ordinary course of business, was the act of infringement waived by the plaintiffs.

I (ii) section 25 (1) of the Act of 1956 was inapplicable because it had no retrospective effect, and it must be assumed that the defendant purchased the tyre from his supplier at a date prior to that at which s. 25 came into operation.

[As to conditions imposed by patentee restricting the sale price of patented article, see 24 HALSBURY'S LAWS (2nd Edn.) 722, 723, para. 1342; and for cases on the subject, see 36 DIGEST (Repl.) 828, 829, 922, 923, 1831-1840, 2759-2777.]

For the Restrictive Trade Practices Act, 1956, s. 25 (1), see 36 HALSBURY'S STATUTES (2nd Edn.) 958.]

Cases referred to:

- (1) *Incandescent Gas Co., Ltd. v. Brogden*, (1899), 16 R.P.C. 179; 36 Digest (Repl.) 923, 2772.
- (2) *National Phonograph Co. of Australia, Ltd. v. Menck*, [1911] A.C. 336; 80 L.J.P.C. 105; 104 L.T. 5; 28 R.P.C. 229; 36 Digest (Repl.) 827, 1820.

Action.

The plaintiffs claimed an injunction to restrain the defendant Longlife Battery Depot (a name under which one John Charles Clark carried on business), from infringing certain letters patent relating to the construction or manufacture of motor car tyres by selling tyres manufactured by the plaintiffs in accordance with those letters patent at less than the plaintiffs' list of retail prices. They also claimed an inquiry as to damages. The plaintiffs particularly relied on (according to para. 2 of the amended particulars of breaches) (a) an advertisement inserted by the defendant in the "Bournemouth Times" of the issue of Nov. 9, 1956, whereby the defendant offered for retail sale tyres at less than list price; (b) the offer for sale by the defendant on Dec. 5, 1956, to Terence Peter Burton of a tyre constructed in accordance with letters patent No. 588,170 (among others), manufactured and sold by the plaintiffs, at a price less than that appearing in the plaintiffs' current list price; (c) the sale of the said tyre to the said Terence Peter Burton.

Lionel Edwards, Q.C., and *P. J. S. Bevan* for the plaintiffs.

F. W. Beney, Q.C., and *M. G. Polson* for the defendant.

Cur. adv. vult.

July 31. **LLOYD-JACOB, J.**, read the following judgment: By this action, the plaintiffs seek relief in respect of certain acts particularised in para. 2 of the amended particulars of breaches, the substance of which relates to an offer for sale and sale of a Dunlop 4.75/5.00 17 motor tyre on Dec. 5, 1956, to a Mr. Burton for the price of £5 11s. This tyre, it was conceded by the defendant, had been manufactured by the plaintiffs in a tyre mould and on ply turndown and bead setting apparatus in accordance with the terms of the monopoly claimed in the first claim of letters patent Nos. 588,170 and 691,195 respectively, both of which letters patent it was further conceded are valid and subsisting. The claim was laid in infringement of these letters patent and also under the provisions of the Restrictive Trade Practices Act, 1956.

The plaintiffs' factual evidence, the whole of which I accept, established that the tyre in question was manufactured by the plaintiffs in or about the second week of July, 1956, and was disposed of by them in the ordinary course of their business. For a full statement of the terms of the arrangements which govern the plaintiffs' dealings in tyres of this character, reference may be had to the exhibit P.1 and the then current price lists P.2 and P.3 with which exhibit P.1 should be read. The provisions material for present purposes can be summarised as follows: Tyres manufactured in accordance with any of the plaintiffs' patent monopolies, of which over a score (including the two here in suit) are specified by number, are sold subject to expressed conditions, and notice is given that resale otherwise than in accordance with such conditions will be regarded as unauthorised and an infringement of letters patent. One of these conditions forbids the advertisement, public offer for sale, sale or supply of any such goods to a retail customer at a price either directly or indirectly higher or lower than the price appearing in the plaintiffs' current price list, the price therein set out for a tyre of the type here in question being £6 6s.

The defendant firm is the name under which a Mr. John Charles Clark carries on business. Besides an office address in Bournemouth, he has six retail shops at which since the summer of 1955 motor car accessories, including motor tyres, have been offered for sale and sold to the public. One shop is managed on

- A Mr. Clark's behalf by a lady, and the others by male managers. One of such shops, at 924, Wimborne Road, Moordown, Bournemouth, is managed by one Stanley Walter Chaney. Until the beginning of November, 1956, advertisements appearing in the public press at the instance of the defendant announced that he offered new tyres of all makes for sale at retail list prices less $12\frac{1}{2}$ per cent., and the evidence establishes that during 1956 the defendant stocked and sold
- B new Dunlop motor tyres on such terms. Each such tyre, if wrapped, bore a label similar to exhibit P.5 and was embossed on the tyre wall with a reference to manufacture under letters patent.

Early in November the plaintiffs wrote letters, marking them for the attention of Mr. Clark or addressing them personally to him, in which they complained of this offer of discount from retail list prices and sent for his perusal a copy of

C their current price list and particulars of their business arrangements and conditions of licence. I entertain no doubt that Mr. Clark was by such communication, if not before, made acquainted with the detailed provisions which I have summarised earlier. He says, and the copy correspondence and the evidence of Mr. Chaney appears to confirm it, that he thereupon issued written instructions to his managers not thereafter to procure any Dunlop tyres for resale at a discount from the retail selling price. Neither Mr. Clark nor Mr. Chaney gave me

D the impression of being candid witnesses, and I strongly suspect that these written instructions were intended to provide a record for the future rather than a guide to the conduct by the manager of his employer's business. However that may be, the instructions did not in terms extend to the arrangements on which existing stocks of tyres should be sold, and despite Mr. Chaney's acceptance

E of full responsibility for what he termed a disregard of his instructions, I am satisfied that Mr. Chaney, knowing that he was being asked for and was selling to Mr. Burton a Dunlop tyre at a discount on the retail selling price which he had had in stock since before Nov. 9, 1956, did so in the knowledge that he was acting as Mr. Clark would have him act in the circumstances. He made a momentary mistake in working out the reduced price, and quoted the figure of

F £6 9s. 6d., but after reference to a record wherein the list price must have been given as £6 6s., he quoted the figure of £5 11s. and drew attention to the amount of discount his quotation provided. There can be no question that in offering this particular tyre for sale (whether at the originally quoted price of £6 9s. 6d. or the subsequently quoted price of £5 11s.) and its eventual sale for £5 11s., the defendant was not complying with the specified conditions of which Mr. Clark

G was at that date aware. The question is whether or not such offer and sale constitute any infringement of letters patent.

Having regard to the admission of facts given by the defendant pursuant to an order of this court dated July 22, 1957, the manufacture of this tyre involved the use of the plaintiffs' inventions covered by the first claims of letters patent

H Nos. 588,170 and 691,195. The second of these two specifications contains no claim to the tyre so manufactured, so that no act of infringement of it could be established by dealing only in the product. The former, on the other hand, does in claim 5 claim a monopoly in tyres when produced by a tyre mould claimed in the earlier claims. The tyre in question accordingly falls within the monopoly rights possessed by the plaintiffs by virtue of the grant to them of letters patent

I No. 588,170, so that unless the defendant can establish a title, direct or derivative, from the plaintiffs to use the patent monopoly as he has, he necessarily infringes. Ever since the decision in *Incandescent Gas Co., Ltd. v. Brogden* (1) ((1899), 16 R.P.C. 179), there has been no question that a purchaser who buys with knowledge of the conditions under which his vendor is authorised to deal in a patented article is bound by such conditions, not because such conditions are contractual but because they are incident to and a limitation on the grant of the licence to deal in the patented article, so that if the conditions are not complied with, there is no grant at all. LORD SHAW OF DUNFERMLINE, giving the advice of the Board in

National Phonograph Co. of Australia, Ltd. v. Menck (2) ([1911] A.C. 336) summarised the matter as follows (*ibid.*, at p. 353):

“... the owner’s rights in a patented chattel will be limited if there is brought home to him the knowledge of conditions imposed, by the patentee or those representing the patentee, upon him at the time of sale.”

The emphasis, it will be noted, is placed on knowledge of the conditions at the time of acquisition of the chattel, and the receipt by Mr. Clark of particulars of such conditions through the communications from the plaintiffs dated in November, 1956, does not and cannot establish such knowledge, for in the absence of proof of the date of acquisition it cannot be assumed that a date subsequent to Nov. 10, 1956, is appropriate, even if the whole of the evidence led by the defendant is dismissed as unworthy of credence. Such communications undoubtedly included disclosure of the allegations of patent monopoly rights in the plaintiffs’ tyres; and, although I am prepared to accept from Mr. Clark that he failed to appreciate this claim and was in consequence unaware of it until the writ was issued, the documents which he received provided grounds on which he ought reasonably to have supposed that such was the fact. Mr. Clark himself has admitted that from the commencement of his dealings early in 1956 he was determined to sell motor tyres to his customers at discounted prices if he could procure supplies, and that he appreciated that such supplies, if of Dunlop tyres, could only reach him from dealers who had acquired them under a written agreement by which they had bound themselves to the plaintiffs to observe the business arrangements and conditions of licence of which he particularly noted the restriction of resale only at list price.

Counsel for the defendant has argued that such knowledge is not sufficient to attract liability, and that the plaintiffs must prove that they gave to the defendant notice of the restrictive conditions as well as of the existence of patent protection at or before the date of acquisition by the defendant of this tyre. In my judgment, the admission of knowledge by Mr. Clark at the date of acquisition sufficiently establishes the receipt of notice, for only by notice could such knowledge have been acquired, and the greater includes the less. Nor is it, in my judgment, necessary for establishing liability that the defendant should have been made aware of the existence of patent protection. The Patents Act, 1949, itself plainly contemplates that acts of infringement may be committed in ignorance of the existence of patent rights, for by s. 59 (1) a right to relief from damages is given to an innocent infringer. That sub-section provides:

“In proceedings for the infringement of a patent damages shall not be awarded against a defendant who proves that at the date of the infringement he was not aware, and had no reasonable ground for supposing, that the patent existed; and a person shall not be deemed to have been aware or to have had reasonable grounds for supposing as aforesaid by reason only of the application to an article of the word ‘patent’, ‘patented’, or any word or words expressing or implying that a patent has been obtained for the article, unless the number of the patent accompanied the word or words in question.”

In the present case, at the date of the sale to Mr. Burton—and this is the date of the infringing act—Mr. Clark had received from the plaintiffs the number of the letters patent in suit, and has not in consequence proved that he had no reasonable ground for supposing that letters patent No. 588,170 existed. But even if no such notice had been received, the act of reselling in breach of a condition known to be applicable to the goods at the time when they were acquired would still constitute an infringement, albeit one which would not attract an award of damages.

In passing, I may perhaps refer to the exhibit P.5, which is the label applied to the wrapped tyre. I am not satisfied that Mr. Clark ever examined any of

A these labels, but in any event the nature of the reference to the patented tyre is not such as to constitute adequate notice under s. 59.

B One further point remains to be considered on this branch of the case, for by para. 4A of the amended defence it is contended that the plaintiffs, in authorising Mr. Burton to act as he did in making his test purchase, assented to a sale below list price and thereby waived the limited licence restriction. Such contention is, in my judgment, misconceived. The acts of infringement complained of are an offer for sale and a sale, and if, as the evidence plainly establishes, these were made in the ordinary course of business as between a shopkeeper and a customer, neither offer nor sale were conditioned or qualified by a relationship between the customer and his employers, of which the shopkeeper was wholly ignorant, nor affected by the instructions the customer had received. The exhibited invoices suffice to show that the sale complained of was not the only sale by the defendant of a Dunlop tyre below list price, and there is accordingly no room for the conjecture that Mr. Burton's identity or behaviour played a compelling part in procuring this act of infringement.

D Accordingly, I hold that the plaintiffs have established the breaches particularised under (a), (b) and (c) in para. 2 of the amended particulars of breaches*, and that so far as concerns (b) and (c) thereof, the defendant has not proved the absence of reasonable knowledge of the existence of patent protection for the article offered for sale and sold.

I turn now to consider that part of the plaintiffs' claim which is based on the Restrictive Trade Practices Act, 1956. Section 25 (1) provides:

E "Where goods are sold by a supplier subject to a condition as to the price at which those goods may be resold, either generally or by or to a specified class or person, that condition may, subject to the provisions of this section, be enforced by the supplier against any person not party to the sale who subsequently acquires the goods with notice of the condition as if he had been party thereto."

F The other provisions of the section are not applicable in the circumstances of this case, the material matters proved being as follows: (i) The plaintiffs sold the tyre, exhibit P.8, at some date after the second week in July, 1956. (ii) It was so sold to a registered dealer on terms which included a condition that it was not to be resold to a member of the public at a price either directly or indirectly higher or lower than £6 6s. (iii) From a date prior to the second week in July, 1956, the defendant, by its proprietor, was aware of the condition in (ii) above, and this tyre, with others, was acquired for the purpose of being resold by the defendant to the public at a price $12\frac{1}{2}$ per cent. lower than the specified price; and (iv) This tyre was resold by the defendant to a Mr. Burton on Dec. 5, 1956, for the price of £5 11s.

H The date of acquisition of this tyre by the defendant, save in the sense that it was after manufacture during July, 1956, and before resale in December, 1956, was not established, so that it cannot be predicated that it antedated the coming into force of s. 25, which by s. 27 of the Act is to be taken as Nov. 2, 1956. Apart from the provisions of this Act, the acquisition of chattels by third parties which had been previously sold subject to conditions gave rise to no cause of action if the third party chose to disregard the conditions or any of them, and the presence or absence of knowledge of such conditions at the time of acquisition by the third party was of no consequence. Section 25 created a right in a supplier of goods, so far as concerns a condition as to resale prices of goods, to enforce the terms of his contract with his immediate purchaser against a sub-purchaser who is aware of that condition at the time he acquires the goods. It is to be noted that such awareness is attached to the time of acquisition, so that a conscious restriction

* As regards these particulars see p. 198, letters C and D, ante.

of freedom to deal in the goods is to be imputed to the sub-purchaser as a term of his contract. A

It becomes necessary, therefore, to examine the language of the section to ascertain whether it is to be construed to cover acquisition of goods with notice of restrictive resale conditions which occurred before the date when the Act became effective, or whether its operation must be restricted to acquisition after that date. The rule of construction to be applied is not, I think, open to doubt. B It is that, save as concerns procedural matters—and this exception is not here material—retrospective operation is not to be given to a statute so as to impair an existing right unless that effect cannot be avoided without doing violence to the language of the enactment. If, as I must assume, the defendant acquired this tyre before November, he had the right at that time to resell it in complete disregard of such restrictive conditions as the plaintiffs had sought to attach. C If s. 25 does include within its purview goods which were so acquired, that existing right has been wholly denied, and a limitation introduced into the defendant's rights of ownership.

For my own part, I cannot avoid the conclusion that a construction which would include pre-Act sales involves a more violent distortion of language than does a construction restricted to post-Act transactions. For the latter, all that D is required is the notional insertion of the word "hereafter" after the opening phrase "Where goods are sold". For the former, it would require a change of tense and a modification of the opening phrase to read "Where goods have at any time been sold" and of the phrase concerning the person not party to the sale to read "who has subsequently acquired the goods". In my judgment, this section is not applicable to goods which were disposed of by the supplier before E the Act came into operation, and I can see no useful purpose in burdening this judgment with references to the detailed arguments which were addressed to me or to the citations referred to as supporting them. This is not, of course, to be understood as reflecting in any way on the conduct of the case at the hearing, for I am deeply conscious of my indebtedness to counsel for the exhaustiveness of their research into the authorities and the clarity and patience of their exposition. F It is rather that, in a judgment already overlong, I prefer to let my conclusion be its own justification, whilst acknowledging that I have endeavoured to comprehend the various lines of approach which have been canvassed in argument.

In the result, therefore, the plaintiffs have established a right to relief under letters patent No. 588,170, but failed to satisfy me that their claim based on the Restrictive Trade Practices Act, 1956, is justified. G

Injunction granted.

The injunction granted was in the following terms:

"An injunction to restrain the defendant from infringing by himself or by his servants, agents or workpeople or otherwise howsoever the plaintiffs' letters patent No. 588,170 by selling or supplying car tyres constructed or manufactured H in accordance with the said letters patent at prices either directly or indirectly higher or lower than, or upon terms differing from, those announced by the plaintiffs from time to time or otherwise in breach of the limited licence granted under the said letters patent."

Solicitors: *Clifford-Turner & Co.* (for the plaintiffs); *Kinch & Richardson*, agents for *Cyril Clark*, Bournemouth (for the defendant).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

A

NATIONAL COAL BOARD v. GAMBLE.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Slade and Devlin, JJ.), July 3, 4, 25, 1958.]

Criminal Law—Aiding and abetting—Intention—Sale of goods completed with knowledge of intended illegality by using overloaded lorry on a road.

B

Coal, being part of a bulk purchase from the National Coal Board, was loaded into a lorry at a colliery for transport by the owners of the lorry to the purchaser. Loading was done through a hopper operated by the board's servants until M., the lorry driver, told them to stop. M. took the lorry to the weighbridge. It was found to be loaded above the maximum permitted weight for the lorry. There were facilities for off-loading at the colliery. H., the servant of the Coal Board at the weighbridge, informed M. of the over-weight and asked whether he intended to take the load. M. said that he would risk it. H. made out the weight ticket and gave it to M. who drove the lorry away. M.'s employers were subsequently convicted, in consequence of his driving this load, of unlawfully using the lorry on a road. At the hearing of an information against the Coal Board of having aided and abetted the offence, the board called no evidence and were convicted. On appeal,

C

D

Held (SLADE, J., dissenting): the Coal Board were rightly convicted of aiding and abetting since—

E

(i) the sale being of unascertained goods, the property in the coal did not pass until the coal on the lorry had been weighed and there had been assent to the quantity on the lorry being taken, such assent being shown by the weight ticket being given to and received by M., and

F

(ii) at the time when the property so passed H. knew of M.'s intention to commit an offence by driving the overloaded lorry on the road, and

(iii) completing the sale with knowledge of the intended illegality was aiding and abetting the unlawful use of the lorry, for (per DEVLIN, J., cf., p. 209, letters B and C, post) H. must be presumed to have intended the natural and probable consequences of his act and, in the absence of any evidence on behalf of the Coal Board, the intent necessary to constitute aiding and abetting was proved.

G

Ackroyds Air Travel, Ltd. v. Director of Public Prosecutions ([1950] 1 All E.R. 933) and *R. v. Bullock* ([1955] 1 All E.R. 15) applied.

R. v. Coney ((1882), 8 Q.B.D. 534) considered and explained.

Observations of DEVLIN, J., on the distinction, in relation to the offence of aiding and abetting, between assistance voluntarily given to a crime and failure to prevent a crime being committed (see p. 207, letters F to I, post).

H

[**Editorial Note.** The importance of the fact that the Coal Board tendered no evidence is emphasised by DEVLIN, J., in relation to the element of mens rea in the offence of aiding and abetting (see p. 210, letters F and G, post). Having regard to the distinction drawn by him between intention and motive (see p. 209, letter E, post) and the dissentient view of SLADE, J., that a motive of endorsing the commission of the offence was essential (see p. 211, letter A, post), it seems that the present decision is authority that indifference to an intended illegality does not negative abetting if a person does an act which in fact aids the commission of a known intended illegality. It is material also to note that a notice warning drivers that the Coal Board were not responsible for the use of overloaded vehicles, which was displayed near the weighbridge, afforded the board no protection (see p. 206, letter B, post; cf., p. 212, letter C, post).

I

As to knowledge in relation to aiding and abetting, see 10 HALSBURY'S LAWS (3rd Edn.) 279, 280, para. 519; and as to knowledge in relation to being an accessory before the fact, see *ibid.*, p. 301, para. 558, text and note (f).]

Cases referred to:

- (1) *Ackroyds Air Travel, Ltd. v. Public Prosecutions Director*, [1950] 1 All E.R. 933; 114 J.P. 251; 14 Digest (Repl.) 101, 644.
- (2) *R. v. Bullock*, [1955] 1 All E.R. 15; 119 J.P. 65; 38 Cr. App. Rep. 151; 14 Digest (Repl.) 645, 6551.
- (3) *R. v. Lomas*, (1913), 110 L.T. 239; 78 J.P. 152; 9 Cr. App. Rep. 220; 14 Digest (Repl.) 106, 701.
- (4) *Simmons v. Swift*, (1826), 5 B. & C. 857; 8 Dow. & Ry. K.B. 693; 5 L.J.O.S.K.B. 10; 108 E.R. 319; 39 Digest 484, 1042.
- (5) *R. v. Fretwell*, (1862), Le. & Ca. 161; 31 L.J.M.C. 145; 6 L.T. 333; 26 J.P. 499; 14 Digest (Repl.) 98, 619.
- (6) *R. v. Steane*, [1947] 1 All E.R. 813; [1947] K.B. 997; [1947] L.J.R. 969; 177 L.T. 122; 111 J.P. 337; 32 Cr. App. Rep. 61; 14 Digest (Repl.) 33, 47.
- (7) *Cook v. Stockwell*, (1915), 84 L.J.K.B. 2187; 113 L.T. 426; 79 J.P. 394; 14 Digest (Repl.) 100, 636.
- (8) *Cafferata v. Wilson*, *Reeve v. Wilson*, [1936] 3 All E.R. 149; 155 L.T. 510; 100 J.P. 489; Digest Supp.
- (9) *Pearce v. Brooks*, (1866), L.R. 1 Exch. 213; 35 L.J.Ex. 134; 14 L.T. 288; 30 J.P. 295; 12 Digest (Repl.) 294, 2264.
- (10) *R. v. Coney*, (1882), 8 Q.B.D. 534; 51 L.J.M.C. 66; 46 L.T. 307; 46 J.P. 404; 14 Digest (Repl.) 91, 540.
- (11) *Wilson v. Inyang*, [1951] 2 All E.R. 237; [1951] 2 K.B. 799; 115 J.P. 411; 2nd Digest Supp.
- (12) *Johnson v. Youden*, [1950] 1 All E.R. 300; [1950] 1 K.B. 544; 114 J.P. 136; 14 Digest (Repl.) 101, 645.
- (13) *Ferguson v. Weaving*, [1951] 1 All E.R. 412; [1951] 1 K.B. 814; 115 J.P. 142; 14 Digest (Repl.) 100, 639.
- (14) *Wilcox v. Jeffery*, [1951] 1 All E.R. 464; 115 J.P. 151; 14 Digest (Repl.) 101, 646.
- (15) *Provincial Motor Cab Co., Ltd. v. Dunning*, [1909] 2 K.B. 599; 78 L.J.K.B. 822; 101 L.T. 231; 73 J.P. 387; 13 Digest 409, 1293.
- (16) *James & Son, Ltd. v. Smee*, *Green v. Burnett*, [1954] 3 All E.R. 273; [1955] 1 Q.B. 78; 118 J.P. 536; 3rd Digest Supp.

Case Stated.

This was a Case Stated by justices for the County of Derby in respect of their adjudication as a magistrates' court sitting at Chapel-en-le-Frith. On Nov. 29, 1957, an information was preferred by William Edward Gamble, the respondent, against the National Coal Board, the appellants (referred to hereinafter as "the Coal Board"), alleging that on Oct. 3, 1957, the Coal Board unlawfully aided, abetted, counselled and procured H. Wilson & Sons (Mosboro), Ltd., to commit the offence of using a heavy six-wheeled motor lorry on Chesterfield Road, at Peak Forest in the County of Derby, which with its load weighed more than twenty tons in contravention of regs. 68 and 104 of the Motor Vehicles (Construction and Use) Regulations, 1955. The information was heard by the justices on Jan. 30, 1958, and the Coal Board were convicted and fined £3. The following facts were found by the justices on the hearing of the information. On Oct. 3, 1957, a six-wheeled registered motor lorry was stopped by the police on Chesterfield Road and the gross weight of the lorry together with its load, was found to be twenty-three tons, eleven hundredweights. The lorry was driven by one Mallender, the servant or agent of H. Wilson & Sons (Mosboro), Ltd., the owners of the lorry, who were accordingly convicted and fined for committing an offence under regs. 68 and 104 of the Regulations of 1955. The lorry had been loaded with coal at the Coal Board's premises at Cotes Park Colliery, Somercotes in the County of Derby in the following manner. Mallender took the empty lorry to a hopper at the colliery, which was operated by the Coal Board's servant, telling the hopper operator when to stop loading.

A Mallender then took the loaded lorry to the Coal Board's weighbridge at the colliery to have the load weighed. The weighbridge operator, one Haslam, who was employed by the Coal Board, having weighed the lorry, informed Mallender that the load was nearly four tons over the permitted weight and asked him whether he intended to take the full load away; Mallender replied that he would risk doing so and accepted a weight ticket from Haslam and

B left the Coal Board's premises. The weight ticket* which was addressed by the Coal Board to the Central Electricity Authority at Carrington, showed that the gross weight of the lorry and its load was twenty-three tons, eighteen hundredweights, the tare weight of the lorry, eight tons and six hundredweights and the net weight of the coal, fifteen tons, twelve hundredweights. On the

C door of the ticket office at the weighbridge a large notice was displayed warning owners and drivers of vehicles that the Coal Board were not responsible for the use of any vehicle on the road which was loaded beyond the permitted capacity. Off-loading facilities were provided by the Coal Board, and Mallender knew this and had off-loaded coal on to another vehicle on previous occasions. It was not the practice of the Coal Board's servants to give any orders to the

D drivers of vehicles but they were requested to act in accordance with the accepted practice at the colliery regarding loading and weighing vehicles. Mallender could not leave the colliery without receiving a weight ticket but he believed that the Coal Board had no control over the loading of his lorry and that, if necessary, he could demand to be given a weight ticket. The Coal Board did not call any evidence and submitted that there was no case for them to answer;

E they contended that under s. 21 of the Weights and Measures Act, 1889† they were under a duty to issue a weight ticket to Mallender; that they had informed Mallender that his lorry was overloaded and if Haslam had refused to issue a ticket to him, there would have been trouble; that the Coal Board had no direct control over Mallender, and that no intention to aid, abet, counsel or

F procure the commission of the offence had been proved as the facts together with the notice on the door of the ticket office showed that in handing over the weight ticket, the Coal Board's intention was to carry out an administrative act which they were bound to perform under the Act of 1889. The Coal Board relied on *R. v. Coney* (10) ((1882), 8 Q.B.D. 534). For the respondent, it was

G contended that the Regulations of 1955 imposed an absolute liability and that in order to prove the offence of aiding and abetting the commission of an offence under the regulations it was only necessary to prove that the Coal Board's servants had full knowledge of the facts which constituted the substantive offence. The respondents relied on *Provincial Motor Cab Co., Ltd. v. Dunning* (15) ([1909] 2 K.B. 599) and *Green v. Burnett* (16) ([1954] 3 All E.R. 273).

H The justices were of the opinion that Haslam on behalf of the Coal Board could and ought to have refused to hand over to Mallender the fifteen tons, twelve hundredweights of coal knowing that Mallender proposed to use it in such a way as to break the law and that the handing over of the weight ticket to Mallender constituted the offence of aiding and abetting; the justices accordingly convicted the Coal Board. The question for the opinion of the court was

I whether, on the facts stated, the justices came to a correct decision in law.

* The Coal Board had a running contract with the Central Electricity Authority for the purchase of coal and Mallender loaded the coal at the colliery for the purpose of taking it to the Electricity Authority at Carrington.

† By s. 21 of the Weights and Measures Act, 1889, the sellers of coal must deliver to the purchaser or his servant before any part of the coal is unloaded, a weight ticket in the prescribed form. The weight ticket may be sent to the purchaser by post, but it is usually delivered to the driver of the vehicle at the weighbridge. The material provisions of s. 21 (1) are stated at p. 208, letter C, post.

John Thompson, Q.C., and D. M. Cowley for the National Coal Board, the appellants. A

P. Ashworth for the respondent.

Cur. adv. vult.

July 25. The following judgments were read.

LORD GODDARD, C.J., summarised the facts found in the Case Stated previously set out and, having said that the presence of the notice displayed on the door of the weighbridge office was immaterial for the purposes of the case, as, if an offence had been committed, the display of the notice could not protect the Coal Board, continued: In *Ackroyds Air Travel, Ltd. v. Public Prosecutions Director* (1) ([1950] 1 All E.R. 933 at p. 936), I stated the law with regard to aiding and abetting in this way: B

"... a person could only be convicted—apart from some special exceptions—as an aider and abettor if he knew all the circumstances which constituted the offence. Whether he realised that those circumstances constituted an offence was immaterial. If he knew all the circumstances and those circumstances constituted an offence . . . that was enough to convict him of being an aider and abettor . . ." C

HUMPHREYS, J., in the same case said (*ibid.*, at p. 936): D

"... it must be shown that the unlawful act has been committed, and, therefore, that the offence has been committed, and, further, that the person charged as an aider and abettor was aware of the facts sufficiently to enable him to know that the act was unlawful." E

Now to enable one to decide whether the Coal Board were properly convicted as aiders and abettors it seems to me necessary to decide in the first instance when the property in the coal had passed. This was a sale of unascertained goods and the property in those goods passes on a sale when the parties intend it should pass and rules are set out in s. 18 of the Sale of Goods Act, 1893, for enabling the court to determine when property passes subject, of course, to the intention of the buyer and seller. In my opinion it is quite clear that neither party could have intended the property in the coal to pass when it was put from the hopper into the lorry. The quantity would have to be ascertained in order to enable the price to be ascertained. The lorry is then taken to the weighbridge to be weighed and in my opinion no sale takes place whereby the property is passed until the weighing is completed and assented to by the buyer and this is shown by the handing to him and the acceptance by him of a weight ticket. F
In my opinion, therefore, no property passed until the weight ticket was accepted by Mallender. G

Now as soon as Haslam weighed the coal he knew it was over weight and called Mallender's attention to that fact. From Mallender's answer he knew that he intended to drive the over-weighted lorry on the highway and with that knowledge he completed the sale and handed the weight ticket to Mallender whose duty then was to give it to the purchasers, namely, the Central Electricity Authority. Haslam could in my opinion have refused to allow the over-weight amount of three tons, eighteen hundredweights to leave the colliery. No specific amount had been asked for. The Coal Board were no doubt bound to deliver coal to the Electricity Authority under their contract, but were not bound to deliver any particular amount of coal at any particular moment. The justices drew the inference, and it was not disputed, that the Coal Board were bound by contract to supply a bulk quantity of coal to the authority. It was urged in this case on behalf of the Coal Board that they had no right to require Mallender to unload the coal or rather the excess, but with this I cannot agree. For the reasons that I have already given the property had not passed until the delivery was completed and it could only be completed by the weighing and the delivery and acceptance of the ticket. H
I

A Suppose a purchaser took his lorry to the hopper and asked for ten tons of coal or the Coal Board had offered to supply him with ten tons of coal. Nobody would know how much the hopper delivered until it had been weighed. If it was found that more than ten tons had been put into the lorry it seems to me beyond question that the Coal Board could insist on the excess being taken out. Here no specific amount was asked for but the Coal Board, by their servant, B knew that more had been put into the lorry than could be lawfully carried on the road and with that knowledge completed the sale. In my opinion that amounted to an aiding and abetting of the offence, as Haslam knew that Mallender was going there and then to drive the lorry on the highway, that, in other words, a specific offence was contemplated.

C In this connexion I would refer to *R. v. Bullock* (2) ([1955] 1 All E.R. 15), where *R. v. Lomas* (3) (1913), 110 L.T. 239, was distinguished. In so holding I do not think that an undue burden is placed on the Coal Board; if their weigh-bridge operators are instructed to refuse to give a weight ticket to the driver of a lorry which with its load exceeds the permitted maximum and the latter nevertheless drives away with the load, the Coal Board will not have aided or abetted the offence. Compliance with the requirements of the Weights and D Measures Act, 1889, can be made by posting the ticket to the purchaser. The Coal Board obviously desire to maintain that the overloading of customers' lorries is no concern of theirs, but in that I cannot agree. The object of the legislation is to protect the roads of the country from damage to which the Coal Board would directly contribute if they allow excessive weight to be taken from their premises. In my opinion the justices came to a right decision in E point of law and I would dismiss this appeal.

I will now ask DEVLIN, J., to read his judgment, and then I will read SLADE, J.'s dissenting judgment.

F DEVLIN, J.: A person who supplies the instrument for a crime or anything essential to its commission aids in the commission of it; and if he does so knowingly and with intent to aid, he abets it as well and is therefore guilty of aiding and abetting. I use the word "supplies" to comprehend giving, lending, selling or any other transfer of the right of property. In a sense a man who gives up to a criminal a weapon which the latter has a right to demand from him aids in the commission of the crime as much as if he sold or lent the article, but this has never been held to be aiding in law (see *R. v. Lomas* (3) G (1913), 110 L.T. 239, and *R. v. Bullock* (2), [1955] 1 All E.R. 15). The reason, I think, is that in the former case there is in law a positive act and in the latter only a negative one. In the transfer of property there must be either a physical delivery or a positive act of assent to a taking; but a man who hands over to another his own property on demand, although he may physically be performing a positive act, in law is only refraining from detinue. Thus in law H the former act is one of assistance voluntarily given and the latter is only a failure to prevent the commission of the crime by means of a forcible detention, which would not even be justified except in the case of felony. Another way of putting the point is to say that aiding and abetting is a crime that requires proof of mens rea, that is to say, of intention to aid as well as of knowledge of the circumstances, and that proof of the intent involves proof of a positive I act of assistance voluntarily done. These considerations make it necessary to determine at what point the property in the coal passed from the Coal Board and what the Coal Board's state of knowledge was at that time. If the property had passed before the Coal Board knew of the proposed crime, there was nothing they could legally do to prevent the driver of the lorry from taking the overloaded lorry out on to the road. If it had not, then they sold the coal with knowledge that an offence was going to be committed.

The Coal Board called no evidence, so that a good deal was left to inference;

but the conclusions of fact reached by the magistrates have not been seriously A
disputed. The Coal Board had an instalment contract with the Central
Electricity Authority for a supply of coal to be delivered at the colliery into
lorries sent by a carrier on behalf of the authority. The quantity of each instal-
ment was not prescribed and the inference is that the Coal Board were to deliver B
and the carrier to receive as much as each lorry could carry (which means of
course as much as it could legally and safely carry) until the contract quantity
was exhausted. The method of delivery was for the lorry to be loaded by
hopper and then to proceed to a weighbridge; there were off-loading facilities
if the load was found to be overweight. At the weighbridge a ticket was issued
in accordance with the Weights and Measures Act, 1889, s. 21 (1), which provides C
that where any quantity of coal exceeding two hundredweight is delivered by
means of any vehicle to any purchaser, the seller of the coal shall deliver or
send by post to the purchaser or his servant, before any part of the coal is
unloaded, a ticket or note in the prescribed form. On this occasion the carrier's
lorry was driven by one Mallender and its maximum legal load (after allowing
for the tare weight) was eleven tons twelve hundredweights. It was loaded at the
hopper, Mallender telling the operator when to stop. Mallender then took
the lorry to the weighbridge. The weighbridge operator, one Haslam, weighed D
the lorry and its load and informed Mallender that his load was nearly four
tons over-weight. Haslam asked Mallender whether he intended taking the
load and Mallender said he would risk it; he then took the weight ticket from
Haslam and left the colliery.

In these circumstances *prima facie* the property in the coal passed on
delivery to the carrier in accordance with r. 5 of s. 18 of the Sale of Goods Act, E
1893. If the delivery was complete after loading and before weighing, the Coal
Board had not until after delivery any knowledge that an offence had been
committed; but where weighing is necessary for the purpose of the contract,
as for example in order to ascertain the price of an instalment, the property
does not pass until the weight has been agreed. In *Simmons v. Swift* (4) ((1826), F
5 B. & C. 857), the parties agreed to buy and sell "the bark stacked at Red-
brook, at £9 5s. per ton". It was held that the property did not pass until the
bark had been weighed and the price ascertained. BAYLEY, J., said (*ibid.*, at
p. 863) that the concurrence of the seller in the act of weighing was necessary
and he might insist on keeping possession until the bark had been weighed.

It was contended on behalf of the Coal Board that Haslam had no option G
after weighing but to issue the ticket for the amount then in the lorry. I think
that this contention is unsound. In the circumstances of this case the loading
must be taken as subject to adjustment; otherwise, if the contract were for
a limited amount, the seller might make an over-delivery or an under-delivery
which could not thereafter be rectified and the carrier might be contractually
compelled to carry away a load in excess of that legally permitted. I think H
that the delivery of the coal was not completed until after the ascertained
weight had been assented to and some act was done signifying assent and
passing the property. The property passed when Haslam asked Mallender
whether he intended to take the load and Mallender said he would risk it and
when the mutual assent was, as it were, sealed by the delivery and acceptance
of the weight ticket. Haslam could, therefore, after he knew of the overload
have refused to transfer the property in the coal. I

This is the conclusion to which the justices came. Counsel for the Coal Board
submits that it does not justify a verdict of guilty of aiding and abetting. He
submits, first, that even if knowledge of the illegal purpose had been acquired
before delivery began, it would not be sufficient for the verdict; and secondly,
that if he is wrong about that, the knowledge was acquired too late, and the
Coal Board was not guilty of aiding and abetting simply because Haslam failed
to stop the process of delivery after it had been initiated.

A On his first point counsel submits that the furnishing of an article essential to the crime with knowledge of the use to which it is to be put does not of itself constitute aiding and abetting; there must be proved in addition a purpose or motive of the defendant to further the crime or encourage the criminal. Otherwise, he submits, there is no mens rea.

I have already said that in my judgment there must be proof of intent to aid.

B I would agree that proof that the article was knowingly supplied is not conclusive evidence of intent to aid. *R. v. Fretwell* (5) ((1862), Le. & Ca. 161) is authority for that. *R. v. Steane* (6) ([1947] 1 All E.R. 813), in which the defendant was charged with having acted during the war with intent to assist the enemy contrary to the defence regulations then in force, makes the same point. But prima facie—and *R. v. Steane* (6) makes this clear also—a man is presumed to intend

C the natural and probable consequences of his acts and the consequence of supplying essential material is that assistance is given to the criminal. It is always open to the defendant, as in *R. v. Steane* (6) to give evidence of his real intention; but in this case the defence called no evidence. The prima facie presumption is therefore enough to justify the verdict, unless it is the law that some other mental element besides intent is necessary to the offence.

D This is what counsel for the Coal Board argues, and he describes the additional element as the purpose or motive of encouraging the crime. No doubt evidence of an interest in the crime or of an express purpose to assist it will greatly strengthen the case for the prosecution, but an indifference to the result of the crime does not of itself negative abetting. If one man deliberately sells to another a gun to be used for murdering a third, he may be indifferent whether

E the third man lives or dies and interested only in the cash profit to be made out of the sale, but he can still be an aider and abettor. To hold otherwise would be to negative the rule that mens rea is a matter of intent only and does not depend on desire or motive.

The authorities, I think, support this conclusion, though none has been cited to us in which the point has been specifically argued and decided. The Lord

F Chief Justice has quoted the statement of the law in *Ackroyds Air Travel, Ltd. v. Public Prosecutions Director* (1) ([1950] 1 All E.R. 933), which is consistent with the results reached in the earlier cases of *Cook v. Stockwell* (7) ((1915), 84 L.J.K.B. 2187), and *Cafferata v. Wilson, Reeve v. Wilson* (8) ([1936] 3 All E.R. 149), and with the later case of *R. v. Bullock* (2) ([1955] 1 All E.R. 15). The same principle has been applied in civil cases where the seller has sued on

G a contract for the supply of goods which he knew were to be used for an illegal purpose. In some of the authorities there is a suggestion that he could recover on the contract unless it appeared that in addition to knowledge of the purpose he had an interest in the venture and looked for payment to the proceeds of the crime. In *Pearce v. Brooks* (9) ((1866), L.R. 1 Exch. 213), POLLOCK, C.B. (*ibid.*, at p. 217) stated the law as follows:

H “ . . . I have always considered it as settled law, that any person who contributes to the performance of an illegal act by supplying a thing with the knowledge that it is going to be used for that purpose, cannot recover the price of the thing so supplied. If, to create that incapacity, it was ever considered necessary that the price should be bargained or expected

I to be paid out of the fruits of the illegal act (which I do not stop to examine), that proposition has been overruled by the cases I have referred to*, and has now ceased to be law.”

The case chiefly relied on by counsel for the Coal Board was *R. v. Coney* (10) ((1882), 8 Q.B.D. 534). In this case the defendants were charged with aiding and abetting an illegal prize fight at which they had been present. The judgments all refer to “encouragement”, but it would be wrong to conclude from that

* Viz., *Cannan v. Bryce* (1819), 3 B. & Ald. 179 and *M’Kinnell v. Robinson* (1838), 3 M. & W. 434.

that proof of encouragement is necessary to every form of aiding and abetting. Presence on the scene of the crime without encouragement or assistance is no aid to the criminal; the supply of essential material is. Moreover, the decision makes it clear that encouragement can be inferred from mere presence. CAVE, J., who gave the leading judgment, said of the summing-up (*ibid.*, at p. 543):

"It may mean either that mere presence unexplained is evidence of encouragement, and so of guilt, or that mere presence unexplained is conclusive proof of encouragement, and so of guilt. If the former is the correct meaning, I concur in the law so laid down, if the latter, I am unable to do so."

This dictum seems to me to support the view which I have expressed. If voluntary presence is *prima facie* evidence of encouragement and therefore of aiding and abetting, it appears to me to be *a fortiori* that the intentional supply of an essential article must be *prima facie* evidence of aiding and abetting.

As to counsel for the Coal Board's alternative point, I have already expressed the view that the facts show an act of assent made by Haslam after knowledge of the proposed illegality and without which the property would not have passed. If some positive act to complete delivery is committed after knowledge of the illegality, the position in law must, I think, be just the same as if the knowledge had been obtained before the delivery had been begun. Of course, it is quite likely that Haslam was confused about the legal position and thought that he was not entitled to withhold the weight ticket. There is no *mens rea* if the defendant is shown to have a genuine belief in the existence of circumstances which, if true, would negative an intention to aid; see *Wilson v. Inyang* (11) ([1951] 2 All E.R. 237). This argument, however, which might have been the most cogent available to the defence, cannot now be relied on, because Haslam was not called to give evidence about what he thought or believed.

The fact that no evidence was called for the defence makes this case a peculiar one. We were told that the Coal Board desired to obtain a decision on principle which would enable them to regulate their practice in the future. They therefore accepted responsibility for Haslam's act without going into any questions of vicarious liability; and they called no evidence in order, we were told, that the decision might be given on facts put against them as strongly as might be. What they wished to establish was that responsibility for overloaded lorries rested solely with the carrier and that the sale and delivery of the coal could not, if that was all that could be proved, involve them in a breach of the criminal law. For the reasons which I have given I think that the law cannot be so stated and that the appeal should be dismissed.

SLADE, J.: Before a person can be convicted of aiding and abetting the commission of an offence the prosecution must prove: (a) that he knew the essential matters which constituted the offence: *Johnson v. Youden* (12) ([1950] 1 All E.R. 300), *Ferguson v. Weaving* (13) ([1951] 1 All E.R. 412); and (b) that with such knowledge he assisted, or at least encouraged, the principal offender to commit the offence.

Mere passive acquiescence is sufficient only, I think, where the alleged aider and abettor has the power to control the offender and is actually present when the offence is committed: for example, the owner of a car sitting alongside his chauffeur when the latter commits an offence.

In my judgment the words "assist" and "encourage" necessarily import motive, i.e., purpose or object. It is not sufficient that the alleged abettor should be proved to have done some act, or to have made some omission, without which the principal offender could not have committed the offence; nor is

A it sufficient that such act or omission had the effect of facilitating the commission of the offence or that it in fact operated on the mind of the principal offender so as to decide him to commit it. The prosecution must prove that the act or omission on which they rely as constituting the alleged aiding and abetting was done or made with a view to assisting or encouraging the principal offender to commit the offence or, in other words, with the motive of endorsing the commission of the offence.

C The foregoing brings me to the facts found, the inferences drawn and the opinions expressed by the magistrates. [Counsel for the Coal Board invited the court to identify the Coal Board with their servant Haslam and, if the court thought Haslam had aided and abetted Mallender, the lorry driver (who was not the servant of the Coal Board) to commit the offence, to treat the Coal Board also as being answerable for Haslam's offence.] As I have reached the conclusion that there was no evidence on which the magistrates could find that Haslam had aided and abetted Mallender to commit the offence, I am prepared to deal with the appeal on the basis of counsel for the Coal Board's invitation, though I should have felt doubtful of the court's jurisdiction to do so in a criminal charge had my opinion been otherwise.

D I accept the opinion of the magistrates that the property in the coal taken from the hopper and loaded into the lorry did not pass from the Coal Board to their customer, the Central Electricity Authority, until Haslam issued the weighbridge ticket to Mallender. It is, I think, clear that Haslam knew the essential matters which constituted Mallender's proposed offence when, but not until, he had weighed the coal. I do not think, however, that Haslam knew that it was the issue of the weight ticket which operated to pass the property in the coal and thus to complete the sale of the coal to the Coal Board's customer, and I regard this consideration as important in considering Haslam's motive in issuing the weight ticket. It is highly improbable that Haslam was acquainted with the provisions of s. 17 and s. 18 of the Sale of Goods Act, 1893, for ascertaining the intention of the parties with regard to the passing of the property in the coal, or that he ever applied his mind to the question of the precise moment at which the property in the coal would thereby be deemed to have passed. I will, however, assume against Haslam that such knowledge must be imputed to him. I then ask myself what courses were open to Haslam when he learnt, for the first time (i.e., on seeing the scale register the tare of the vehicle and the weight of the coal as in excess of twenty tons) the essential matters of the offence which he knew that Mallender intended to commit. Two courses only were open to him: (1) to call on Mallender to off-load the coal, or so much of it as was necessary to reduce the total weight to twenty tons, and to refuse to issue a weight ticket; or (2) to leave the coal where it was, thereby completing the sale, whereon he would have to issue the weight ticket in order to avoid contravening the requirements of s. 21 of the Weights and Measures Act, 1889. Haslam chose the second of these alternatives, and it is his adoption of this choice which has been held by the magistrates to constitute the aiding and abetting of Mallender's offence.

H If there were any evidence that Haslam's exercise of this choice was inspired by a desire to encourage Mallender to commit the offence (which Haslam knew I Mallender intended to commit) I would agree with the magistrates' decision. Some acts or omissions speak for themselves; they are consistent only with a desire to encourage or assist. Other acts or omissions are quite colourless and no sinister inference can legitimately be drawn from them. The motive for these can only be supplied by other conduct, for example, where an otherwise equivocal act is accompanied by words of encouragement to commit the offence.

Counsel for the Coal Board referred us to *R. v. Coney* (10) ((1882), 8 Q.B.D. 534), and particularly to the judgment of HAWKINS, J. (*ibid.*, pp. 557 et seq.).

R. v. Coney (10) was considered by the Court of Criminal Appeal in *Wilcox v. Jeffery* (14) ([1951] 1 All E.R. 464) and both these cases seem to me to emphasise the importance of ascertaining the motive underlying an act or omission relied on as constituting encouragement to another to commit an offence. A

I do not think the magistrates applied their minds to the question whether Haslam issued the weight ticket and thereby completed the sale for the purpose of, or with a view to encouraging Mallender to commit the offence, or whether he did so with no such purpose in mind. Indeed if I am wrong in my view that the words "encourage" and "assist" necessarily import "motive" there is no reason why they should have done so. B

None of the facts found by the magistrates are in my judgment capable of supporting the inference that Haslam, in making the choice he did, issued the weight ticket and thereby completed the sale with a view to encouraging Mallender to commit the offence which Mallender informed him he intended to commit. On the contrary, I think the facts so found tend to negative rather than to support any such inference, for example, the large notice displayed by the Coal Board on the door of the weighbridge ticket office and the facts found in para. 4, sub-para. (k) and (l)* of the Case; nor can I see any reason why Haslam should desire to encourage the commission of the offence. C
D

Moreover, if knowledge is not to be imputed to Haslam as to the precise moment when the property in the coal passed to the Coal Board's customer, I think Haslam was in a difficult position and may well have thought that he had no right to insist on the off-loading of the excess coal, that Mallender might well have demurred to any such insistence, and that he, Haslam, could only have enforced his demand by taking the law into his own hands. E

For these reasons I think that the question raised by the Case should be answered in the negative, and that the conviction of the Coal Board should be quashed.

Appeal dismissed.

Solicitors: *Donald H. Haslam*, agent for *Lawrence C. Jenkins*, Nottingham (for the National Coal Board, the appellants); *Kingsford, Dorman & Co.*, agents for *D. G. Gilman*, Derby (for the respondent).

[Reported by WENDY SHOCKETT, Barrister-at-Law.]

* These facts were that it was not the practice of the Coal Board's servants to give orders of any kind to drivers, though the servants were asked to act in accordance with accepted practice at the colliery regarding loading and weighing vehicles; and that if Mallender had not received his weight ticket he could not have gone off the colliery but that the Coal Board had no control over his actions, and in particular he believed he could do as he liked as regards loading and what he carried on his vehicle, and that, if necessary, he could have demanded to be given a weight ticket.

A

MEYER v. LEANSE.

[COURT OF APPEAL (Jenkins, Parker and Pearce, L.J.J.), July 24, 25, 1958.]

Arbitration—County court—Reference to arbitration—Setting aside award—Extent of county court's discretion—County Courts Act, 1934 (24 & 25 Geo. 5 c. 53), s. 89 (3) proviso, as amended by Administration of Justice Act, 1956 (4 & 5 Eliz. 2 c. 46), s. 31 (4).

B

In a county court action brought by a landlord against his tenant for £314 8s. 6d. damages for dilapidations there was a reference by consent under s. 89 of the County Courts Act, 1934, to an arbitrator. The arbitrator awarded the landlord £92 9s. and gave him only one-third of his costs. The county court judge set aside the award, though he found no error of law on the face of it and misconduct was not alleged, holding that his discretion under the proviso to s. 89 (3) to set aside an award was a wider discretion than the High Court had, and that an injustice might have been done to one of the parties. On appeal,

C

D

Held: a county court judge determining whether an award of an arbitrator to whom a matter had been referred should be set aside under the proviso to s. 89 (3) of the County Courts Act, 1934, had no wider discretion than the High Court and should follow the same principles as the High Court followed; therefore, since in the present case there was no error in law on the face of the award and no misconduct on the part of the arbitrator, the award should not have been set aside.

E

Observations on the desirability that county courts should have statutory power to remit arbitration matters (see p. 219, letters G to I, post).

Appeal allowed.

[As to references of county court proceedings to arbitrators and the setting aside of awards, see 9 HALSBURY'S LAWS (3rd Edn.) 215, para. 475.

F

As to the grounds on which the High Court may set aside an arbitrator's award by statute, see 2 HALSBURY'S LAWS (3rd Edn.) 57, para. 125; and as to the inherent jurisdiction to set aside an award for error in law apparent on the face of the award, see *ibid.*, p. 60, para. 127.

G

As to the reference by the High Court of matters to arbitration, see the Supreme Court of Judicature (Consolidation) Act, 1925, ss. 89, 91; 18 HALSBURY'S STATUTES (2nd Edn.) 505, 509.

For the County Courts Act, 1934, s. 89, see 5 HALSBURY'S STATUTES (2nd Edn.) 71; and for the Administration of Justice Act, 1956, s. 31 (4), see 36 HALSBURY'S STATUTES (2nd Edn.) 179.]

Cases referred to:

H

- (1) *Kent v. Elstob*, (1802), 3 East, 18; 102 E.R. 502; 2 Digest (Repl.) 650, 1714.
- (2) *Hodgkinson v. Fernie*, (1857), 3 C.B.N.S. 189; 27 L.J.C.P. 66; 140 E.R. 712; 2 Digest (Repl.) 656, 1762.
- (3) *Brown v. Dean*, [1910] A.C. 373; 79 L.J.K.B. 690; 102 L.T. 661; 13 Digest 513, 619.

Appeal.

I

This was an appeal by Leon Gerald Leanse, formerly the tenant of furnished premises, against an order of His Honour JUDGE LEON, made on Mar. 6, 1958, at Willesden County Court, setting aside the award of an arbitrator, dated Sept. 20, 1957, on a reference by consent under s. 89 of the County Courts Act, 1934, awarding damages for dilapidations to the landlord, Karl Meyer. The facts appear in the judgment of PARKER, L.J.

John Davies for the appellant (the tenant).

A. R. Barrowclough for the respondent (the landlord).

JENKINS, L.J.: I will ask PARKER, L.J., to deliver the first judgment.

PARKER, L.J.: It is convenient to refer at the outset to the terms of s. 89 of the County Courts Act, 1934, which, as amended by the Administration of Justice Act, 1956, s. 31 (4), is in these terms:

"(1) The judge may, with the consent of the parties to any proceedings, order the proceedings to be referred to arbitration (whether with or without other matters within the jurisdiction of the court in dispute between the parties) to such person or persons and in such manner and on such terms as he thinks just and reasonable.

"(2) No such reference shall be revocable by any party except with the consent of the judge.

"(3) On any such reference the award of the arbitrator, arbitrators or umpire shall be entered as the judgment in the proceedings and shall be as binding and effectual to all intents as if given by the judge: Provided that the judge may, if he thinks fit, on application made to him within such time as may be prescribed by county court rules, set aside the award, or may, with the consent of the parties, revoke the reference or order another reference to be made in the manner aforesaid."

Sub-section (3) is the important sub-section in this case which raises interesting questions as to the exact powers given to a county court judge under that sub-section, which is substantially in the same terms as s. 77 of the County Courts Act, 1846.

The matter arises in this way. Under an agreement in writing dated Aug. 4, 1954, the plaintiff landlord let to the defendant tenant certain furnished premises, No. 8, Linnell Close, London, N.W.11, for six months as from July 6, 1954. In fact, by reason of a further agreement and by holding over, the tenant remained in occupation of those premises until May 4, 1956. Throughout that period it was a term of the tenancy that the tenant should

"take due and proper care of the demised furniture and effects and [should] keep the same and the said premises and garden and the fixtures and conveniences thereto in the same state and condition as they now are and so surrender the same at the expiration or sooner determination of the tenancy reasonable use and wear and tear and damage by accidental fire excepted."

It was also a term of the tenancy that the tenant should

"pay for the cleaning or washing of such blankets counterpanes curtains covers and other articles as may require washing or cleaning at the expiration or sooner determination of the tenancy to leave clean the chimneys and windows and to make good all such articles as may become broken lost chipped stained cracked or otherwise injured during the tenancy or at the option of the landlord to pay for the same."

After the tenant had left the premises disputes arose as to the amount of the dilapidations, and in due course the landlord commenced these proceedings in the county court claiming damages. The damages claimed were in the sum of £314 8s. 6d., and broadly speaking they can be classified under three heads: (1) the cost of making good the decorations, (2) cleaning etc. of the soft furnishings and (3) damage to furniture.

The matter was referred under s. 89 to arbitration, and a Mr. Jones, an experienced surveyor, was appointed arbitrator. The hearing took no less than four days—Apr. 29, 30, May 1 (when the arbitrator inspected the premises), May 3 and finally Sept. 18, when there was a special hearing to hear argument in regard to costs. By his award of Sept. 20, 1957, the arbitrator awarded the landlord damages in the sum of £92 9s. as against the £314 8s. 6d. claimed. That sum of £92 9s. was mainly in regard to heads (2) and (3) which I have mentioned. With regard to head (1), namely, that in respect of the decorations, the arbitrator

- A apparently took the view that by May 4, 1956, when the tenant left the premises they needed what I may call general redecoration as the result of fair wear and tear, and that such damage as the tenant had done over and above fair wear and tear would be made good without extra cost in the general redecoration. Accordingly, the arbitrator came to the conclusion that the landlord had not proved any damage under that head. He did, however, allow something in respect of
- B cigarette burns which he felt would not be made good in the general redecoration and he also allowed something in respect of what is called the back lobby, which apparently had been completely redecorated just before the tenant went into occupation. He went on to say that if the conclusion that he had come to, viz., that the landlord had not shown that he had suffered any damage under that head, was wrong in law, he would have awarded the sum of £65. Finally,
- C in regard to costs he awarded the landlord only a third of his costs, apparently taking the view that the claim was an exaggerated claim, and having regard to the fact that the landlord's claim under head (1) had failed.

On Sept. 30, 1957, the landlord gave notice of an application to the county court under the proviso to s. 89 (3) to set aside the award of the arbitrator. I need not read the notice. Broadly speaking, it was on two grounds, first, that

D there was an error of law on the face of the award in the arbitrator's holding that no damage had been shown, and, secondly, that there was an error of law disclosed in that the arbitrator had deprived the landlord of two-thirds of his costs. The matter came before the county court judge, as I have said, on Mar. 6 of this year when he held that there was no error on the face of the award either

E in respect of the arbitrator's decision in regard to the decorations or in regard to his decision in respect of costs. He, however, came to the conclusion that his discretion to set aside an award under the proviso to s. 89 (3) of the County Courts Act, 1934, was wider than the High Court has either under the Arbitration Act, 1950, or under its inherent jurisdiction. The county court judge held that he could set aside an award if he felt that there might be a serious injustice.

In his award the arbitrator had said this in regard to the head "Decorations":

- F "I find that the house was redecorated in 1950 and that these decorations could not be expected to last more than seven years in property of this type, although I consider that five years would be a more reasonable estimate of their life. It therefore follows that the house was due for redecoration by the time the [tenant] yielded up possession, and such
- G markings as the [tenant] may have made would not worsen the [landlord's] position. All decorations were covered by a 'fair wear and tear clause' in the lease, and the reparation of such fair wear and tear would correct any damage which may have been done by the [tenant] without extra cost to the [landlord]. I, therefore, find that the [landlord] has failed to prove that any damage has been suffered."

- H As to that finding the learned county court judge said this:

I "If the arbitrator had only said that he had inspected the house (as he had on May 1, 1957) and that he was satisfied from its condition on his inspection and from the evidence called before him that it required redecoration on the surrender by the [tenant] by reason of fair wear and tear, apart altogether from the additional damage, his award on this point could not be criticised. But he has not simply said that. It was common ground that nothing had been done to the premises since the delivery up of possession in order that the arbitrator might see its actual condition. It should, therefore, have been perfectly simple for an arbitrator who is a surveyor to base his finding substantially on what he saw. But the first two sentences of the paragraph headed "Decorations" strongly suggest at any rate that the arbitrator was basing his finding that redecoration was necessary in any event by theorising. He finds that the house was redecorated in 1950 and

then proceeds, apparently, to arrive at his conclusion by what normally would happen with a house of that type. Houses and decoration vary and so does the weather. Any one house may require redecorating sooner than another for a variety of reasons. Where the house is not available for inspection it is only possible to come to a decision upon the probabilities, but where a house is available for inspection theorising appears to me to be quite irrelevant. The arbitrator was in a position to say from his inspection whether the house needed redecoration."

Then at the foot of that page the judge said this:

"Now an award by a non-legal arbitrator is not to be read too closely for niceties of language, but, even bearing that in mind, I feel bound to say that the way in which the arbitrator appears from the form of his award to have arrived at his decision is unsatisfactory and may do a serious injustice to the [landlord]. In these circumstances I am satisfied that if I have a general power to set aside the award it ought to be set aside, but I am not satisfied that the [landlord] has established that there is an error of law appearing on the face of the award. The onus is upon him to satisfy me as to this and he has not done so. It is one thing to find an award couched in unsatisfactory language which shows that an injustice has been or may have been done. It is another thing to be satisfied that the award contains a patent error of law."

Having so held, he went on to hold that in fact he had a general discretion under the section. He summarises the matter thus:

"But where, as in this case, a judge considers that a serious injustice may have been done to one of the parties, he will certainly be entitled to exercise his discretion to set aside an award."

Against that judgment, the tenant appeals to this court, and counsel on his behalf makes two submissions. First, that the judge was wrong in holding that he had a general discretion to set aside. He could, says counsel, set aside the award only on the same grounds as would entitle the High Court to set aside an award, namely, for an error of law or for misconduct or for an improper procuring of an award. Secondly, and in the alternative, counsel says that even if the judge had a wider discretion, it was wrongly exercised in the present case in that it was based on a fallacious assumption, namely, that the arbitrator might have based his finding entirely on theory and might have ignored the actual condition of the premises which he undoubtedly saw on his inspection on May 1.

The landlord, on the other hand, puts in a counter notice and counsel on his behalf makes two submissions: (i) that the arbitrator's award in regard to these decorations discloses an error of law on its face, and (ii) that the finding in regard to costs also shows an error of law.

It is convenient, I think, to deal first with the landlord's contention, because if there is an error of law manifest on the face of this award, then I do not think anybody could be heard to suggest that there was not ample power to set the award aside. For my part, like the learned judge, I am not satisfied that there is any error of law manifest on the face of the award in the sense that that expression has been used. It certainly cannot be asserted that the whole or a proportion of the cost of making good damage is necessarily the test. The measure must vary from case to case according to the exact facts. But counsel for the landlord, while agreeing, I think, with that, says that here it is shown that the arbitrator made the wrong approach; that he found as he did on a theory that decorations only last so many years and that, accordingly, when that number of years is up, the premises require redecoration. Counsel submits that the finding would only be justified if the arbitrator had said that having examined the premises he had come to the conclusion that the whole of the

A premises required complete redecoration and that such damage as the tenant had done had not made any additional damage to the premises.

For my part, I am not prepared to adopt the view that the arbitrator did ignore what he found at his view. After all, what he saw either confirmed the theory or it did not; if it did not confirm the theory, then this arbitrator was guilty of grave misconduct, and there is no real warrant as I see it, for imputing that to him. Indeed, the approach that the court makes to an award has always been to support the validity of the award and to make every reasonable intendment and presumption in its favour, and for my part I cannot think that this experienced surveyor did intend to base his finding entirely on theory; indeed, he must have been influenced by what he saw in his apparently very careful inspection of the premises. As regards the question of costs, I, again like the learned judge, am quite satisfied that whatever view one might have taken oneself in regard to the award of costs, it certainly cannot be said that in doing what he did the arbitrator erred in law.

Accordingly, I pass to the first, and the more interesting, of the points involved, namely, whether the county court judge under s. 89 of the County Courts Act, 1934, has a wider discretion than has the High Court in regard to the setting aside of an award such as this. This power to set aside an award first appeared in the County Courts Act, 1846, s. 77, and in substantially the same form. At that time the position of the higher courts in regard to awards was, I think, this. The only statutory power to set aside was to be found in the Arbitration Act, 1698 (9 Will. 3 c. 15), s. 2, in these terms:

E “And be it further enacted by the authority aforesaid, that any arbitration or umpirage procured by corruption, or undue means, shall be judged and esteemed void and of none effect, and accordingly be set aside by any court of law or equity . . .”

At the same time the court had always exercised its inherent jurisdiction at common law to set aside an award for misconduct, and that inherent power was made statutory in the Arbitration Act, 1889. In 1802, as the learned county court judge points out, in *Kent v. Elstob* (1) ((1802), 3 East, 18) the court asserted power to set aside awards for errors of law. Moreover, at the time of the County Courts Act, 1846, there was no power to order a Special Case on a point of law; that power was first given, I think, by the Act of 1889. Also, as I understand the position, there was no general power to remit; indeed, power to remit was first given by the Common Law Procedure Act, 1854. In *Hodgkinson v. Fernie* (2) ((1857), 3 C.B.N.S. 189) COCKBURN, C.J., said this (*ibid.*, at p. 201):

H “The only remaining question is, whether or not the court is called upon to interfere by reason of s. 8 of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125). It is true that section gives the court authority, in any case where reference shall be made to arbitration, at any time, and from time to time, ‘to remit the matters referred, or any or either of them, to the re-consideration and re-determination of the said arbitrator, upon such terms, as to costs and otherwise, as to the said court or judge may seem proper’. I am, however, clearly of opinion that it was not intended by that enactment to alter the general law as to the principles upon which the courts had been in the habit of acting in determining whether they would or I would not set aside awards; but merely to give the court power to remit the matter to the arbitrator for re-consideration in all cases, though the submission should not contain that extremely useful clause giving them that power, where it turned out that there was a fatal defect in the award, but of such a nature as not to render it expedient to set aside the award, and thus render nugatory all the expense that had been incurred under the reference.”

The learned judge felt that the failure of Parliament in the Act of 1846 to

lay down the limits of the powers disclosed an intention to leave it completely at large, and the words "if he thinks fit" supported, he thought, that view. Thus he said:

"It would have been perfectly simple for Parliament in 1846 to provide in s. 77 the grounds on which an award could be set aside, as was provided in the Act of 1698 or as was later enacted in the various Arbitration Acts. But it did not do so. It left on the face of it an unfettered judicial discretion to the judge to set aside 'if he thinks fit'."

With all respect to the learned county court judge, I am unable to take the same view. The failure of Parliament to do in regard to the jurisdiction of the county court what it had failed to do in regard to the jurisdiction of the High Court is, in my judgment, no ground for saying that it intended to confer on the county court a different and wider jurisdiction. It must be remembered that the courts were in those days far less inclined to interfere with awards than today. In those days misconduct, to justify setting aside an award, had to be what I may call real as opposed to technical misconduct, and, indeed, a manifest error of law had only then recently been held to be a ground for setting aside an award, a matter which, incidentally, many judges regretted. Indeed, in *Hodgkinson v. Fernie* (2), to which I have referred, WILLIAMS, J. (3 C.B.N.S. at p. 202), said this:

"The law has for many years been settled, and remains so at this day, that, where a cause or matters in difference are referred to an arbitrator, whether a lawyer or a layman, he is constituted the sole and final judge of all questions both of law and of fact. Many cases have fully established that position, where awards have been attempted to be set aside on the ground of the admission of an incompetent witness or the rejection of a competent one. The court has invariably met those applications by saying: 'You have constituted your own tribunal; you are bound by its decision'. The only exceptions to that rule, are, cases where the award is the result of corruption or fraud, and one other, which, though it is to be regretted, is now, I think, firmly established, viz. where the question of law necessarily arises on the face of the award, or upon some paper accompanying and forming part of the award. Though the propriety of this latter may very well be doubted, I think it may be considered as established."

In those circumstances I feel that, if Parliament had intended the county court to exercise a jurisdiction on wider principles than those exercised in the High Court, express words would have been necessary to confer that extended jurisdiction, and I cannot think that the words "if he thinks fit" are sufficient to attain that end. Indeed, I think that some help is to be gained from a consideration of *Brown v. Dean* (3) ([1910] A.C. 373). Apparently in the County Courts Act, 1888, and indeed, I think, in the County Courts Act, 1846, there was a provision that a county court judge could order a new trial, and the words there again were "if he shall think just". That is in 1888, and I think that the words in 1846 were "if he thinks fit". In *Brown v. Dean* (3) the county court judge had granted a new trial on the basis of new evidence which it was said had come to light since the trial. The Divisional Court reversed his decision, the Court of Appeal upheld the Divisional Court, and the matter came before the House of Lords. The argument ([1910] A.C. 374) proceeded thus:

"The County Courts Act, 1888, gives a full and absolute discretion to order a new trial 'in every case', but of course the discretion must be judicial. The judge must think it just that there should be a new trial. That is the only condition. There is no warrant for adding the words that the rules of the High Court apply to county courts."

LORD LOREBURN, L.C., after stating the principles on which the High Court

A would act in such a case, referred first to the judgment in the Court of Appeal by FARWELL, L.J. He said ([1910] A.C. at p. 375):

B “ I agree with the judgment of FARWELL, L.J., in which he says, referring to the earlier authorities, ‘ In the present case the county court judge has disregarded those principles, and has granted a new trial on affidavits which and that is clearly not enough—which show nothing in the nature of surprise, fraud, or conspiracy, and which also state nothing to show that the information alleged could not with reasonable diligence have been obtained at the first trial. The real ground that influenced the learned judge appears to have been that he came to his former conclusion of fact with hesitation, and that the matter is serious for the defendant in consequence of his position. Neither of these grounds is in my opinion sufficient ’.”

C Later LORD LOREBURN said (*ibid.*, at p. 375):

D “ But it is said we have no jurisdiction upon the ground that under the County Courts Act a county court judge is entitled to grant a new trial ‘ if he shall think just ’. Those words do not give him an arbitrary discretion. ‘ If he shall think just ’ means if he shall think just according to law. The rules to which I have referred are the law which he, like other judges, is bound to obey.”

E Finally, under this head one asks oneself the question: if there is a wider discretion conferred by the proviso to s. 89 (3) of the County Courts Act, 1934, what are the limits to it? Once one gets away from the principles on which the High Court will act, where is the limit? Can it be said (and if there are no limits to the discretion it could be said) that a county court judge has power to receive evidence on affidavit as to what took place in the arbitration, not in order to show misconduct on the part of the arbitrator—that could always be done—but to show what was not patent on the face of the award, namely, that he had erred in law? It seems to me that if one was to treat the discretion at its widest in that sense, it would be in a sense revolutionary, certainly revolutionary in 1846.

F For those reasons I am satisfied that the county court judge in exercising his discretion under the proviso to s. 89 (3) must follow the same principles on which the High Court acts in regard to setting aside awards. Accordingly, it becomes unnecessary to consider the second contention of counsel for the tenant, which G is the alternative one, that even if there were this wide discretion, it was wrongly exercised.

H I would like to add this. As I have already said, it would appear that the county court judge under s. 89 (3) proviso has no power to remit; he certainly is not given express power to remit, and, as I have already said, it is probable that until 1854 the High Court possessed no inherent power, either generally or as ancillary to a power to set aside, to remit. Indeed, the industry of counsel in this case has failed to find any such case. That power was, as I have said, first given to the court in the Common Law Procedure Act, 1854, and is now to be found in the Arbitration Act, 1950, s. 22, but the court referred to in that section is the High Court and, while the reference to “ any court ” in s. 4 of the Act of 1950, which relates to the stay of proceedings, has been held to include the county court*, that does not make it legitimate to construe “ court ” in s. 22 as referring to another court than the High Court. I cannot help thinking that it is an unfortunate omission in s. 89 (3) of the County Courts Act, 1934, that there is no express power to remit. The present case shows this very clearly, since I cannot help thinking that if the power had existed, the judge would have welcomed the exercise of it and would have remitted this case to the arbitrator.

* See *Morrison Tinplate Co. v. Brooker, Dore & Co.*, [1908] 1 K.B. 403, a decision under the corresponding section of the Arbitration Act, 1889.

It may be that it would be possible to obtain, as it were, a power to remit by making it a condition of the terms of reference under s. 89 (3), but I think that a power to remit is really essential for the proper working of this section.

For the reasons which I have endeavoured to state, I would allow this appeal.

PEARCE, L.J.: I agree with all that my Lord has said.

JENKINS, L.J.: I entirely agree, and although we are differing from the learned judge, I cannot usefully add anything to the reasons given by PARKER, L.J.

Appeal allowed.

Solicitors: *Franks, Charlesly & Leighton* (for the tenant); *Herbert Oppenheimer, Nathan & Vandyk* (for the landlord).

[Reported by HENRY SUMMERFIELD, Esq., *Barrister-at-Law.*]

SCALA BALLROOM (WOLVERHAMPTON), LTD. v. RATCLIFFE AND OTHERS. *HH Enoc Powell Re*

[COURT OF APPEAL (Hodson, Morris and Sellers, L.JJ.), July 30, 1958.] *best.*

Conspiracy—Unlawful purpose—Musicians' Union refusing to permit members to accept employment from plaintiffs because of plaintiffs' ban on coloured people attending ballroom—Whether union has a material interest to protect—Whether interest must be assessable in money.

The plaintiffs were the proprietors of a ballroom from which they decided to exclude "coloured" persons. The Musicians' Union gave notice to the plaintiffs that none of its members would perform in the ballroom until the colour bar was lifted. The plaintiffs applied for an interlocutory injunction to restrain the officials of the union from persuading or attempting to persuade any members of the union not to perform at their ballroom. Evidence was given on behalf of the union officials that the union had many coloured members and that it was considered essential to the interests of its members that all manifestations of the colour bar should be lawfully opposed. On the question whether the defendants had committed the tort of conspiracy the court found that the defendants had agreed among themselves to effect a purpose resulting in damage to the plaintiffs, and as to the legality of that purpose,

Held: the purpose was not illegal (and there was therefore no actionable conspiracy) because, *prima facie*, the defendants had a lawful purpose, viz., to protect the interests and livelihood of the members of the union.

Dictum of VISCOUNT CAVE, L.C., in *Sorrell v. Smith* ([1925] A.C. at p. 711) applied. Dictum of VISCOUNT SIMON, L.C., in *Crofter Hand Woven Harris Tweed Co., Ltd. v. Veitch* ([1942] 1 All E.R. at p. 150) considered.

SEMBLE: lawful interests that can be protected by acts which if done in furtherance of an unlawful purpose would constitute the tort of conspiracy are not confined to interests that are material in the sense that they can be expressed in terms of money (see p. 223, letter I, and p. 224, letters F and G, post).

Appeal dismissed.

[As to conspiracy, see 32 HALSBURY'S LAWS (2nd Edn.) 189, 190, 505-511, paras. 283, 807, 808; and for cases on the subject, see 43 DIGEST 112, 113, 1171-1183.]

Cases referred to:

- (1) *Crofter Hand Woven Harris Tweed Co., Ltd. v. Veitch*, [1942] 1 All E.R. 142; [1942] A.C. 435; 111 L.J.P.Q. 17; 166 L.T. 172; 2nd Digest Supp.

- A** (2) *Sorrell v. Smith*, [1925] A.C. 700; 94 L.J.Ch. 347; 133 L.T. 370; 43 Digest 113, 1183.

Interlocutory Appeal.

This was an appeal by the plaintiffs from an order of DIPLOCK, J., dated July 29, 1958, whereby he refused to grant them an interlocutory injunction to restrain the defendants, officials of the Musicians' Union, from persuading or attempting to persuade members of the union not to perform in the plaintiffs' ballroom.

J. G. Le Quesne for the plaintiffs.

H. Lester for the defendants.

C **HODSON, L.J.:** The plaintiffs, who are the proprietors of the Scala Ballroom, are seeking to restrain the defendants, who are officials of the Musicians' Union, from persuading or attempting to persuade any members of the union not to perform at the Scala Ballroom, and from persuading or attempting to persuade any persons to refrain from employing any musicians on the ground that those musicians have played or agreed to play at the Scala Ballroom.

D The ballroom was opened on Apr. 28, 1958, by the plaintiffs, who subsequently decided to deny admittance to coloured people. That was a course which they were entitled to adopt in their own business interests; but the reaction of the officials of the Musicians' Union was immediate as soon as the licence was granted by the licensing justices at Wolverhampton and publicity was given to that licence. The first defendant is the general secretary of the Musicians' Union; the second defendant is the assistant secretary of the union; and the third defendant is the midland area organiser of the union. A question arises in this case whether in any event the first defendant is a party to the combination which has been alleged by the plaintiffs, but it is unnecessary to discuss that matter further.

The second defendant wrote to the plaintiffs, saying on behalf of the union:

F " Our attention has been drawn to press reports concerning your policy of racial discrimination as it will affect the clientele of your ballroom. According to these reports, coloured people are not permitted to enter the ballroom . . . The long-established policy of the Musicians' Union is strongly opposed to discrimination of any kind including, of course, racial discrimination, and, assuming the reports to be accurate, we hereby give you notice that members of the Musicians' Union will not be permitted to perform at the Scala Ballroom on any occasion so long as a policy of racial discrimination is maintained by its proprietors. Instructions are being issued accordingly, but, should you decide to abandon your policy of racial discrimination, please notify us immediately."

H There were various contracts outstanding with the band leaders to perform at the ballroom. The question arose whether those contracts were being interfered with by the defendants, and on July 2, 1958, the plaintiffs issued their writ for damages for conspiracy and claiming an injunction restraining the defendants from, inter alia, persuading or attempting to persuade any member of the union not to perform at the Scala Ballroom, and with regard to existing contracts, an injunction was granted by HAVERS, J., on July 9, 1958, restraining the defendants, their servants and agents, from procuring or attempting to procure any member of the Musicians' Union to break any contract to perform at the Scala Ballroom until the trial of the action or until further order. There was no appeal against that order, but the rest of the summons was adjourned and came before DIPLOCK, J., who refused to grant the injunction asked for, and in respect of that refusal this appeal has been brought.

I This appeal calls for consideration of the law of conspiracy which was considered and very closely analysed by the House of Lords in *Crofter Hand Woven*

Harris Tweed Co., Ltd. v. Veitch (1) ([1942] 1 All E.R. 142). The relevant claim in this case is that the defendants have wrongly combined and conspired together to injure the plaintiffs in the way of their trade by preventing members of the union from playing at the Scala, and it has been necessary for the judges who have had to deal with this matter and for this court to consider the element of the tort of conspiracy as a civil wrong. Any decision arrived at on an application for an injunction is a provisional decision and it would be wrong to attempt to lay down in detail the law which is relevant to this case. I accept the submission of counsel for the plaintiffs that, if there is a reasonable probability that he is entitled to the relief that he has claimed, this court would be ready to grant an injunction; and he submits, in support of his application, that the learned judge's approach to this matter has not been correct. I must, therefore, refer to some extent to the *Crofter* case (1), where VISCOUNT SIMON, L.C., pointed out (*ibid.*, at p. 147), as indeed did DIPLOCK, J., in the present case, that in order to make out their case plaintiffs have to establish (a) agreement between the defendants (b) to effect an unlawful purpose (c) resulting in damage to the plaintiffs. The learned judge has found an agreement between the defendants, and he has also found resultant damage to the plaintiffs. I think, as I read the affidavits, that there is *prima facie* evidence to support his finding. "In doing so", he says, "they [the defendants] would necessarily injure the plaintiffs in their trade." The remaining element is, however, the one which always gives rise to difficulty in these cases, that which is under the heading (b), viz., "to effect an unlawful purpose".

In one of the leading cases in the House of Lords, *Sorrell v. Smith* (2) ([1925] A.C. 700), VISCOUNT CAVE, L.C., after examining three cases in their Lordships' House, extracted certain principles and formulated two propositions, namely (*ibid.*, at p. 712):

"(1) A combination of two or more persons wilfully to injure a man in his trade is unlawful and, if it results in damage to him, is actionable. (2) If the real purpose of the combination is, not to injure another, but to forward or defend the trade of those who enter into it, then no wrong is committed and no action will lie, although damage to another ensues."

Their Lordships pointed out that those propositions do not necessarily cover the whole ground, and are in various cases difficult to apply. It is clear from the authorities and I accept the submission of counsel for the plaintiffs that it is not necessary for him to prove malevolence. He submitted that there was here a combination to do acts which necessarily resulted in injury to the plaintiffs' trade, and he submitted further that the combination was unlawful unless the real purpose was to protect the legitimate interests of the combiners. His argument was to the effect that one could equate interests with material interests, which might be described in other words as selfish interests, and he submitted that there was no real material selfish interest of the defendants to be safeguarded here. In that connexion I will refer to some further language of LORD SIMON. He said in *Crofter Hand Woven Harris Tweed Co., Ltd. v. Veitch* (1) ([1942] 1 All E.R. at p. 148):

"However the origin of the rule may be explained, I take it to be clear that there are cases in which a combination of individuals to act in a certain way, resulting in deliberate damage to others, is actionable, even though the same thing, if done by a single individual without any element of combination, would not expose him to liability."

In dealing with what counsel for the present plaintiffs quite correctly called the legitimate interests of the defendants, he said (*ibid.*, at p. 150):

"I am content to say that, unless the real and predominant purpose is to advance the defendants' lawful interests in a matter where the defendants honestly believe that those interests would directly suffer if the action taken against the plaintiffs was not taken, a combination wilfully to damage

A a man in his trade is unlawful. Although most of the cases have dealt with trade rivalry in some form or other, I do not see why the proposition as to the conditions under which conspiracy becomes a tort should be limited to trade competition. Indeed, in its original sense, conspiracy as a tort was a combination to abuse legal procedure: WINFIELD, HISTORY OF CONSPIRACY, c. II. I have used the word 'directly' without seeking to define its boundaries as an indication that indirect gains, such as the subscriptions in the illustration above, would not provide a justification."

B All their Lordships made it clear that there might be difficult cases for consideration where the interests which the defendants sought to protect were not business interests. We have been taken through a large part of the speeches of all their Lordships and they all, or nearly all, touch on that aspect of the problem, and it is submitted by counsel for the plaintiffs that the effect of the authority to which I have referred is that only in so far as what may be called in the narrow sense strictly material interests are concerned can the defendants say that they have lawful interests to protect.

C This question of a colour bar has very wide application, and it is submitted that there are no selfish or material interests for the defendants to protect here. Their own employment is not, it is submitted on the evidence, in peril, and they are really seeking to prevent the plaintiffs from carrying on their business in their own way by excluding from their ballroom people whom they wish to exclude; but I do not think that that is really the effect of the evidence. Mr. Henry Francis Major, who was the second defendant and was sued as Harry Francis, has sworn an affidavit in this matter, from which I quote:

D "A colour bar is a particularly dangerous form of discrimination in its effect on musicians since it tends to endanger their livelihood; it lowers the standards of the profession, and it creates friction in their relationship with one another. The fact that the colour bar is limited to the dancers in the 'public' dance hall and is not imposed on the musicians themselves is irrelevant because the insidious effects of the colour bar are the same. It is impossible for musicians to insulate themselves from their audience. The Musicians' Union has many coloured members some of whom are of great distinction and popularity. The feeling that they are welcome so long as they stay on the band platform, but that neither they nor their relatives would be permitted to go on to the dance floor is deplorable. In short it is considered by the Musicians' Union to be essential to the interests of its members that all manifestations of colour bar should be lawfully opposed as far as possible. The plaintiffs recently achieved a degree of notoriety in connexion with their declared policy of excluding coloured people from their dance hall. In accordance with the declared policy of the Musicians' Union and with a view to the furtherance of the interests of its members, the third defendant and myself sent the communications referred to in Mr. Wade's affidavit. In our view this is a trade dispute. We have no desire to injure the plaintiffs in their business; on the contrary we wish them to prosper. The action we have taken has been directed solely to secure conditions of labour, vital to musicians. If we had done nothing, it would have appeared as though the colour bar policy of the plaintiffs was being condoned by the Musicians' Union and there would undoubtedly have been much bitterness amongst members and damage to the union."

I am not prepared, at any rate, for the purposes of this provisional opinion, to say that the interests which can lawfully be protected are confined to the material interests in the sense of interests which can be exchanged for cash. Lawful interests in my judgment may and I think do extend further than that; but, reading the affidavit, parts of which I have just read, it seems to me that *prima facie*, at any rate, the defendants in this case, who represent the members of the

Musicians' Union, which includes amongst its members a great many coloured people, have a lawful interest to protect in looking after their members' interests and, taking the long view, in looking after their livelihood as well. I would agree, therefore, that the learned judge was right. A

Another matter was raised before the learned judge and still remains open now, viz., the question whether the Trade Disputes Act, 1906, applies and whether the defendants are in any event protected from any action by the provisions of that Act of Parliament. I express no opinion on that for we have not heard argument on that aspect of the case. The matter has been dealt with on the fundamental issue between the parties whether, apart altogether from the statutory defence which may be available to the defendants, the plaintiffs have made out a prima facie case on the merits entitling them to an injunction. I agree that they have not done so and I think, therefore, that this appeal should be dismissed. B
C

MORRIS, L.J.: I agree. In his speech in *Crofter Hand Woven Harris Tweed Co., Ltd. v. Veitch* (1) VISCOUNT SIMON, L.C., said ([1942] 1 All E.R. at p. 149):

"If the predominant purpose is the lawful protection or promotion of any lawful interest of the combiners, it is not a tortious conspiracy, even though it causes damage to another person." D

Assuming for present purposes that there was an agreement between the defendants and that what was done pursuant to such agreement has resulted or will result in damage to the plaintiffs, the question now to be considered is whether the agreement was in order to effect an unlawful purpose. On the evidence that is before us, it appears that the real purpose—the real reason of any agreement or combination—was to advance the interests of the defendants and that the proof goes beyond showing that there was merely no purpose of injuring the plaintiffs. E

Counsel for the plaintiffs has forcibly submitted that it should be shown that the purpose of the defendants involved some material advantage to them. If the matter is approached on that basis, then it seems to me that passages in the affidavit of Mr. Francis suggest that the defendants honestly believe that material advantage to their members is involved. But it seems to me that, if the defendants honestly believe that a certain policy is desirable and that it is the wish of their members that that policy should prevail and that there should be no colour bar discrimination, it can be said that the welfare of the members is being advanced, even though it cannot be positively translated into or shown to be reflected in detailed financial terms. F
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It is unnecessary at the present stage to express final and concluded opinions in regard to these matters, but in my judgment, on the material before us, it would not be appropriate that the injunction which is sought should be granted.

SELLERS, L.J.: I agree. Notwithstanding the forcible and interesting argument of Mr. Le Quesne, I do not think that a prima facie case has been made out and I have nothing to add to the reasons which my Lord has given. H

Appeal dismissed.

Solicitors: *Peacock & Goddard*, agents for *Michael J. Wade*, Wolverhampton (for the plaintiffs); *Hall, Brydon, Egerton & Nicholas* (for the defendants).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

A

THOMSON (INSPECTOR OF TAXES) v. MOYSE.

[CHANCERY DIVISION (Wynn-Parry, J.), July 17, 18, 21, 22, 1958.]

Income Tax—Foreign possessions—Income arising from possessions out of United Kingdom—Income arising from securities out of United Kingdom—Taxpayer's life interests in American estates—Income credited to New York bank account—Cheques drawn by taxpayer in dollars on account—Cheques purchased by English banks—Proceeds credited to taxpayer's English bank accounts—Whether sums received by taxpayer in the United Kingdom—Income Tax Act, 1918 (8 & 9 Geo. 5 c. 40), Sch. D, Case IV, r. 2, Case V, r. 2.

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The taxpayer, a British subject resident in the United Kingdom but domiciled in the United States of America, was entitled to income from the estate of his mother (which during part of the relevant period was in course of administration) and from the estate of his father, both estates being in the United States. The income was credited to his account in the Bank of New York. He drew cheques in dollars on that bank in favour of one or other of his two English banks, and requested them to convert the proceeds into sterling or to purchase the cheques. As authorised dealers under the Exchange Control Act, 1947, his English banks sold the dollars specified in the cheques to the Bank of England and credited the taxpayer's account with the sterling equivalent of the dollars specified in the cheques. They then presented the cheques to the Bank of New York, which honoured them and transferred the dollars to the account of the Bank of England with the Federal Reserve Bank of the United States. In their transactions with the Bank of England and the Bank of New York, the English banks were found by the Special Commissioners to have acted as principals and not as the taxpayer's agents for clearing the cheques. The taxpayer was assessed to income tax in respect of the sums with which he was credited as being sums received in the United Kingdom (a) within Case IV, r. 2 of Sch. D to the Income Tax Act, 1918 (income from the mother's estate during administration) and (b) within Case V, r. 2 of Sch. D (other income). On appeal,

Held: the assessments could not be maintained, since—

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(i) as the English bankers acted as principals and not as the taxpayer's agents, his transactions with them were contracts for the purchase of sterling made in England and to be performed in England, and the proceeds either were not income or were not income "arising from securities out of the United Kingdom" and therefore were not taxable under Case IV of Sch. D (*Paget v. Inland Revenue Comrs.*, [1938] 1 All E.R. 392, applied), and

(ii) as no dollars were brought into the United Kingdom as a result of the transactions, or, if dollars were brought in they were brought in by the Bank of England not by the taxpayer, there was nothing that was taxable under Case V of Sch. D as the taxpayer's income arising from foreign possessions (*Carter v. Sharon*, [1936] 1 All E.R. 720, and *Pickles v. Foulsham* (1925), 9 Tax Cas. 261, applied).

Appeal dismissed.

I

[As to what constitutes a remittance for the purposes of Case IV and Case V of Sch. D, s. 123 of the Income Tax Act, 1952 (replacing corresponding provisions in the Income Tax Act, 1918), see 20 HALSBURY'S LAWS (3rd Edn.) 269, 270, para. 489; and for cases on the subject, see 28 DIGEST 77-81, 422-450.

For the Income Tax Act, 1918, Sch. D, Case IV, r. 2, and Case V, r. 2, see 12 HALSBURY'S STATUTES (2nd Edn.) 171, 172; and for the corresponding provisions in the Income Tax Act, 1952, s. 132 (2), (3), see 31 HALSBURY'S STATUTES (2nd Edn.) 128, 129.]

Cases referred to:

- (1) *Edwards v. Bairstow*, [1955] 3 All E.R. 48; [1956] A.C. 14; 36 Tax Cas. 207; 3rd Digest Supp.
- (2) *Paget v. Inland Revenue Comrs.*, [1938] 1 All E.R. 392; [1938] 2 K.B. 25; 107 L.J.K.B. 657; 158 L.T. 187; 21 Tax Cas. 677; Digest Supp.
- (3) *Carter v. Sharon*, [1936] 1 All E.R. 720; 20 Tax Cas. 229; Digest Supp.
- (4) *Foulsham v. Pickles*, [1925] A.C. 458; 94 L.J.K.B. 418; 133 L.T. 5; sub nom. *Pickles v. Foulsham*, 9 Tax Cas. 261; 28 Digest 25, 131.
- (5) *Inland Revenue Comrs. v. Gordon*, [1952] 1 All E.R. 866; [1952] A.C. 552; 33 Tax Cas. 226; 3rd Digest Supp.
- (6) *Scottish Mortgage Co. of New Mexico v. McKelvie*, (1886), 2 Tax Cas. 165; 28 Digest 77, 422 i.

Case Stated.

The taxpayer appealed to the Special Commissioners of Income Tax against assessments to income tax made on him in the sums of £2,335 for 1949-50, £2,500 for 1950-51 and £2,500 for 1951-52 under Case IV and of £3,457 for 1949-50, £3,500 for 1950-51 and £3,500 for 1951-52 under Case V of Sch. D to the Income Tax Act, 1918. The question for determination was whether the taxpayer was liable to assessment to income tax under Case IV in respect of income from securities in the United States of America and under Case V in respect of income from possessions in that country.

The taxpayer was born an American citizen and remained domiciled in the United States. At all material times he was a British subject resident in the United Kingdom. He was entitled to a life interest in a trust in the United States under the will of his father, and to a life interest in the residuary estate of his mother, also in the United States, and in course of administration from Aug. 19, 1943, to Apr. 18, 1951. The income from these two life interests was paid in dollars by the executors and trustees into the taxpayer's account at the Wall Street, New York, branch of the Bank of New York. It was common ground that this income, in so far as it arose in the course of the administration of the mother's estate, was income arising from securities out of the United Kingdom and that, in so far as it arose from that estate after the completion of the administration and from the trust under the father's will, it was income arising from possessions out of the United Kingdom.

Under s. 1 (1) of the Exchange Control Act, 1947, the taxpayer was prohibited from selling the dollars to a person other than an authorised dealer as defined in s. 42 without Treasury permission. By s. 2 (1), in default of Treasury permission to retain them, he was compelled to offer the dollars for sale to an authorised dealer. At no time during the material period did he have permission to sell the dollar income, the subject of appeal, otherwise than to an authorised dealer or to retain it.

From previous banking experience the taxpayer was aware of an old-established practice in the City of London whereby a banker might be willing to purchase outright cheques in foreign currencies drawn on foreign banks, provided he knew the customer and even without knowing the state of the customer's account at the foreign bank if satisfied of his integrity. Otherwise a bank would follow the normal method of collecting money from the foreign bank of the drawer of the cheque as an agent and crediting the customer's account in due course.

Except for an item of refunded United States Federal tax (post), nothing was paid into the taxpayer's New York bank account other than his income from the life interests. For the relevant period, the taxpayer drew cheques in dollars on his New York bank account in favour of Seligman Bros., part of whose normal banking practice was the purchase of such cheques, or of Midland Bank, Ltd., of London, both of whom were authorised dealers. With each of the four cheques drawn in favour of Seligman Bros. in June, August and December, 1948, and February, 1949, he sent Seligman Bros. a letter asking them to purchase the

A cheque and to credit his account with the proceeds in sterling and subsequently to transfer part of the proceeds to the credit of his bank account with Midland Bank, Ltd., Kingsway Branch. Seligman Bros. purchased the cheques and sold them either to the Bank of England or to a customer with a permit to purchase dollars from the Bank of England, or to a person with whom they were entitled to deal within the limits set by the Bank of England. They credited the

B taxpayer's account with the sterling equivalent after deduction for exchange commission, stamp and other charges. They viewed the transactions with the taxpayer as purchases and sales of currency and considered that the contracts were for dollars implemented by the taxpayer handing them cheques in that currency. In each case they instructed their correspondents in New York to whom they daily sent by registered post all New York cheques acquired by them:

C (a) to have the cheque cleared on the taxpayer's bank in New York; (b) to credit the dollars to Seligman Bros.' bank account in New York; and (c) to pay out of Seligman Bros.' New York bank account so many dollars (as had been sold to the Bank of England) to the Federal Reserve Bank in New York for the credit of the account of the Bank of England.

A cheque drawn in favour of the taxpayer by the United States Treasury representing a refund of United States federal tax in the sum of \$908.19 was received by the taxpayer through the post from the United States Treasury and was forwarded by him to Seligman Bros. on Dec. 8, 1948, with instructions "to convert this into sterling". This item was distinct from the other transactions since the cheque was not drawn on the taxpayer's bank account in New York. Nevertheless, Seligman Bros. adopted the same practice and purchased the

E cheque crediting the taxpayer with the sterling equivalent.

On June 16, 1949, the taxpayer drew a cheque on his New York bank account in favour of Midland Bank, Ltd., as he had previously done with Seligman Bros., and thereafter he used Midland Bank, Ltd., for all the transactions. The procedure of Midland Bank, Ltd., was similar to that of Seligman Bros. Where they bought cheques drawn on New York they would credit the customer's account

F the same day, whereas when clearing a cheque (which did not arise in the taxpayer's case) it would be a matter of some days before the customer got his credit.

Neither Seligman Bros. nor Midland Bank, Ltd. was aware of the source of the taxpayer's funds in his New York bank account, and neither made any inquiry as to the extent of his resources in the United States. Seligman Bros. never

G made returns to the Exchange Control Committee of the Bank of England showing individual items relating to the taxpayer, the taxpayer's cheques being included with other cheques in the global sum in the periodical returns which they made as an "authorised bank" to the Bank of England. Midland Bank, Ltd. followed a similar practice.

The taxpayer contended: (i) that the sums received by the taxpayer in the

H United Kingdom arose from contracts concluded in the United Kingdom between the taxpayer and the respective bank and were not remittances of United States income; (ii) that the taxpayer's United States income was not properly received by him in the United Kingdom within the meaning of Case IV and r. 2 of Case V; (iii) that the source of the sterling credited to the taxpayer's London bank

I accounts was the sale and purchase as between the taxpayer and the particular bank; and (iv) that the provisions of the Finance Act, 1953, had no bearing on the years under appeal. The Crown contended: (i) that the amounts of sterling credited to the taxpayer as a result of the cheque transactions in so far as attributable to the estate of his mother during the period of administration were sums received in the United Kingdom within the meaning of Case IV, r. 2 of Sch. D; and (ii) that the amounts of sterling credited to the taxpayer as a result of the cheque transactions in so far as attributable to the income from the estate of his mother after the period of administration or to the income from the estate

of his father were sums received in the United Kingdom within the meaning of Case V, r. 2 of Sch. D. The commissioners found that the taxpayer gave no instructions to his New York bank to remit sums of money to him in the United Kingdom, and that, in dealing with the cheques which the taxpayer asked them to purchase, neither Seligman Bros. nor Midland Bank, Ltd. were acting as a collecting agent on the taxpayer's behalf but in every case acted as a principal. Having regard to the transactions between these banks, the Bank of England and the correspondents in the United States, they held that no remittances of American income had been brought into the United Kingdom and they did not accept the view that there had been a constructive remittance. This decision applied equally to the Case IV and Case V assessments. They therefore held that the appeal succeeded and discharged the assessments except for the Case IV assessment for 1949-50 which they reduced to £263. The Crown appealed.

J. G. Foster, Q.C., and A. S. Orr for the Crown.

F. N. Bucher, Q.C., and P. J. Brennan for the taxpayer.

WYNN-PARRY, J.: The respondent taxpayer was entitled to payment of income from (a) the estate of his father, and (b) the estate of his mother, both estates being situated in the United States of America. The state where they are situate is not identified in the case, but it is agreed that ascertainment of that state is not material. Payments of such income were periodically made by the trustees of the two estates into an account in the taxpayer's name in the Bank of New York. The taxpayer is and was at all material times domiciled in the United States of America. The taxpayer is entitled to rely on the provisions of Case IV and Case V of Sch. D to the Income Tax Act, 1918, which is the relevant statute. During the administration of the estate of his mother, the relevant Case is Case IV; after completion of that administration, so far as his mother's estate is concerned and over the whole period in question so far as his father's estate is concerned, the relevant case is Case V.

The elements of the transaction to be considered are these:—(a) The taxpayer drew cheques in dollars on the Bank of New York in favour of one or other of his bankers in this country, Seligman Bros. or Midland Bank, Ltd. He requested them to convert the proceeds into sterling or to purchase the cheques. (b) His English bankers, as authorised dealers under the Exchange Control Act, 1947, then sold the amount of dollars specified in the respective cheques to the Bank of England and credited to his account an amount in sterling equivalent at the then rate of exchange to the amount of dollars specified in the cheques. (c) His bankers then, by registered mail, presented his cheques to the Bank of New York. The Bank of New York honoured the cheques and, on the instructions of his English bankers, transferred the amount of dollars in question in each case to the account of the Bank of England with the Federal Reserve Bank of the United States.

On those facts the question arises: Do those transactions fall within Case IV or Case V of Sch. D to the Income Tax Act, 1918? The charge is levied under Sch. D, para. (1) (a) (i) and Case IV and Case V of that Schedule are relieving provisions. It follows in my view that they should not be used to extend the liability of the taxpayer.

Counsel for the taxpayer contends that the transactions between the taxpayer and his English bankers are reducible to this: (i) I give you a cheque drawn on the Bank of New York in dollars. (ii) You give me the sterling equivalent at the prevailing rate of exchange. (iii) My cheque on the Bank of New York is the consideration for your payment to me of that sterling sum. (iv) If the Bank of New York meet my cheque the transaction is finished; but if they do not do so for lack of sufficient funds, then you can come on me for the amount of sterling which you have paid to me. In other words, it can be said that this is a contract for the purchase of sterling made in England and to be performed in England,

A and it is no part of the contract that dollars are to be brought into England. Further, there is no evidence that dollars were brought into England, but, if they were brought in, they were so brought in not as the property of the taxpayer but as the property of the Bank of England. In my view this reasoning is correct.

B It is further said: income tax is a tax on sterling; suppose that between the date of the giving of the cheque drawn on the Bank of New York by the taxpayer to his English bankers there had been a fluctuation in the rate of exchange, then it must follow that, when the cheque drawn by the taxpayer was presented by the English bankers to the Bank of New York, it would not produce a sum in sterling equivalent to the sum which had been paid by the English bankers on taking over (to use a neutral term) the taxpayer's cheque drawn on the Bank of New York. This, it is said (and I think rightly so) emphasises and
C supports the view of the Special Commissioners that, however the transaction is regarded, the English bankers acted as principals and not as agents.

Counsel for the Crown strongly contested this conclusion of the Special Commissioners, but, having carefully considered their findings in para. 7 of the Case, which I regard as findings of primary facts, and applying the test applied by Lord RADCLIFFE in *Edwards v. Bairstow* (1) ([1955] 3 All E.R. 48 at p. 55 et seq.) I
D am not prepared to say that the conclusion of fact at which the Special Commissioners arrived was contrary to the only reasonable possible conclusion. Apart from the statement of primary facts in para. 7 of the Case, I observe that the Special Commissioners had the benefit of considering a large number of documents which do not form part of the Case, though they were available for examination, and of hearing witnesses examined and cross-examined. In those circum-
E stances, it appears to me that I should hesitate long before I interfere with their conclusion that the English bankers acted as principals, particularly as it appears to me to be the proper conclusion on my analysis of the facts.

On that view of the facts it appears to me that the result must be the same, whether the case is considered under Case IV or Case V. On that issue, I
F do not feel that it is necessary to embark on any detailed review of the authorities.

So far as Case IV is concerned, I think I need do no more than refer to *Paget v. Inland Revenue Comrs.* (2) ([1938] 1 All E.R. 392). So far as material that case may be summarised as follows. Miss Paget held certain Hungarian bearer bonds the interest coupons of which were payable in London in sterling and in certain other countries in the respective currencies of those countries. By a
G decree dated Dec. 22, 1931, the Hungarian government directed that the interest on the bonds should not be paid direct to creditors but that its equivalent in pengos should be deposited with the Hungarian National Bank and placed in a foreign creditors' fund, out of which bondholders might obtain payment of interest coupons in pengos, but only for use for certain purposes in Hungary. Miss Paget did not obtain payment in this way, but sold certain coupons, after
H they had fallen due, through agents or coupon dealers in London, who deducted income tax on payment to her of the proceeds of such sales. Miss Paget also held certain bearer bonds of the Kingdom of Yugoslavia the coupons of which were payable in American dollars in New York. On July 24, 1933, the Yugoslavian government gave notice of its inability to pay the interest in full and offered to meet the coupons maturing from Nov. 1, 1932, to May 1, 1935, either
I by payment in "blocked" dinars in Belgrade or by payment of ten per cent. of their face value in dollars and by the issue of funding bonds for the balance. Miss Paget did not accept this scheme but in September, 1933, sold the interest coupons due on Nov. 1, 1932, and May 1, 1933, through agents or coupon dealers in London, who deducted income tax on payment to her of the proceeds of such sale. On an appeal against assessments to surtax for the years 1932 to 1933 and 1933 to 1934 the Special Commissioners decided (a) that the deposit of pengos with the Hungarian National Bank constituted performance of the obligation to pay interest on the Hungarian bonds and the proceeds of the coupons falling due

at the respective dates of deposit represented interest arising to Miss Paget and must be included in her total income for surtax purposes. Then they held differently as regards the Yugoslavian bonds. On appeal to the court, it was held that in neither case did the proceeds of sale of coupons received by Miss Paget constitute income for income tax purposes. A

In the Court of Appeal, SIR WILFRID GREENE, M.R., having considered the argument that the case fell within Sch. C and having rejected it, said (*ibid.*, at p. 397): B

"The appellants' main argument, therefore, fails. But they claimed in the alternative that the purchase price of the coupons was 'income arising from securities out of the United Kingdom', and was charged with income tax under Case IV of Sch. D. There are two subdivisions of this argument. C
The first is that the purchase price was taxable by deduction under Miscellaneous Rule 7, [of Sch. D] which applies to certain interest, etc., the rules of Sch. C already discussed. The second is that Miss Paget was directly assessable in respect of the purchase price. The latter of these two contentions can be disposed of quite shortly. The purchase price received by Miss Paget was not income arising from the bonds at all. It arose from D
contracts of sale and purchase, whereby Miss Paget sold whatever right she had to receive such income in the future, as well as her right to take what was offered by the defaulting debtors. It is, in my opinion, quite impossible to treat this as equivalent in any sense to 'income arising from' the bonds."

LORD ROMER also rejected the argument that the case fell within Sch. C, and he said (*ibid.*, at p. 404): E

"In these circumstances, the only question to be decided is whether the proceeds of sale of a right to receive income in the future can be treated as income for the purpose of the Income Tax Acts. The question thus broadly stated plainly admits of but one answer, and that answer must be in the negative. F
The proceeds of the sale for a lump sum of an annuity, for instance, are capital in the hands of the vendor, and not income, and this is true even when the subject of the sale is, not the annuity for its whole duration, but the right to be paid the annuity for a number of years, or even for one year. Nor is it any the less true because the purchaser will pay for an annuity that will be subject to a deduction of income tax in his hands less than he would pay for a tax-free annuity. Nor is it any the less true because in many cases the net income, when paid to the purchaser, is not income in his hands. G
In the case, for instance, of a man carrying on the business of dealing with coupons, the sum collected by him on cashing a coupon will be merely a trade receipt, and not income. Tax may have H
been deducted on payment of the coupon, but for surtax purposes the interest represented by the coupon cannot be regarded as forming part of the total income of anybody. This is a position that frequently occurs. The net income received by a trustee under a trust for accumulation of income is a case in point. But it is easy to conceive cases which, while appearing at first sight to be sales for money or money's worth of a right I
to receive income in the future, are not in reality sales at all. If a man possessed of a coupon representing interest payable under deduction of tax hands it to his tailor as a convenient method of paying for a suit of clothes, the tailor, when cashing the coupon, may well be considered as doing so on behalf of his customer, and as then paying himself out of the proceeds. The customer in such a case could not avoid returning the gross amount of the interest as part of his total income for surtax purposes.

A If, on the other hand, the tailor were to accept the coupon in full discharge of his account, the interest that it represents would not, when paid, be income of the customer. Still less would the suit of clothes form part of his income."

B On the reasoning of those passages and having regard to the view which I have taken of the transactions in this case, I conclude that none of the transactions in question fall under Case IV.

C So far as Case V is concerned the transactions in the present case appear to me to fall within the decision in *Carter v. Sharon* (3) ([1936] 1 All E.R. 720). In the case of income from foreign possessions it must be shown either that the taxpayer received it in this country or that he was entitled to it at the time it arrived in this country. In *Pickles v. Foulsham* (4) ((1925), 9 Tax Cas. 261), having stated r. 2 of Case V, VISCOUNT CAVE, L.C., said (*ibid.*, at p. 288):

D "From this rule it follows that, in order to be taxable under Case V, an income arising from possessions out of the United Kingdom must be received in the United Kingdom either (a) from remittances payable in the United Kingdom, or (b) from property imported into the United Kingdom, or (c) from money or value arising from property not imported, or (d) from money or value received on credit or on account of remittances, property, money, or value brought or to be brought into the United Kingdom. The word 'remittances' (which recalls the expression 'remittances from thence' in the corresponding rule contained in the Act of 1842) clearly refers to money remitted into the United Kingdom from outside. The other branches of the rule all refer to property, money or value imported or brought into the United Kingdom, and there are no words in the rule which can comprise money arising and payable here. If so, the inference is that money so arising and payable is outside the rule, and so is not taxable under Case V at all."

E I cite that passage in support of the proposition, which I do not see can be denied, that for Case V to operate the dollars in question in this case must be shown to have been brought into the United Kingdom. I have held, however, that it is not shown that any dollars were brought into the United Kingdom as a result of the transactions in question.

G The only observation that I would add is on a passage from the speech of LORD COHEN in *Inland Revenue Comrs. v. Gordon* (5) ([1952] 1 All E.R. 866) where his Lordship is reported as saying this, in dealing with an argument put forward by counsel for the Crown which he abandoned in the course of the case (*ibid.*, at p. 870):

H "There might have been another difficulty in counsel's way had he persisted in this argument. To succeed on it, it would have been necessary for him to satisfy us that the 'money or value arising from property not imported' need not itself be brought into the United Kingdom. It is plain from the wording of the rule that sums cannot be said to be received in the United Kingdom from the first, second or fourth sources unless the source was itself payable in, imported into, or brought or to be brought into the United Kingdom. It would be strange if the sums received in the United Kingdom from the third source were within the rule although the money or value was not imported or to be imported into the United Kingdom. It would be all the more strange since sums received in the United Kingdom from the fourth source—i.e., 'money or value so received on credit or on account in respect of . . . such . . . money, or value'

(i.e., the third source)—could not bring the rule into operation unless *such* money or value had been brought or was to be brought into the United Kingdom. I incline, therefore, to the view that to succeed under the rule in respect of sums received from the third source the Crown must establish that the money or value had been brought or was to be brought into the United Kingdom.”

It is true that the point there dealt with by LORD COHEN and the opinion which he said he inclined to express was expressly reserved by LORD MORTON OF HENRYTON and LORD TUCKER, though LORD NORMAND adopted the whole of LORD COHEN'S speech. I propose for the purposes of this judgment to assume that what LORD COHEN said is, strictly speaking, to be regarded as obiter, but, accepting that basis, I would respectfully adopt the language of LORD COHEN as my own for the purposes of this judgment, because if I may say so with respect, the analysis which he there makes appeals to my mind.

Counsel for the Crown relied strongly on *Scottish Mortgage Co. of New Mexico v. McKelvie* (6) ((1886), 2 Tax Cas. 165). That case has been the subject of both comment and criticism. Where it has been considered to have been rightly decided, it has been regarded as a case turning on its very special facts. Certainly it has been said that it is not to be regarded as a starting point from which to draw new inferences. Even more so, I cannot regard it as a satisfactory authority for the purpose of cutting down the relieving effect of Case IV or Case V.

During the argument, a great many authorities were referred to and carefully and exhaustively examined by counsel for the Crown. I am grateful to him, and indeed also to counsel for the taxpayer, for the care which was bestowed on the authorities, and I intend no disrespect to either of them, particularly to counsel for the Crown, for not having traversed them seriatim. As I hope will be seen from my judgment, my decision really first and last turns on the analysis of the transactions which I have made; and, on that analysis and having regard to what I conceive to be the effect of Cases IV and V, under whichever case the matter can be said to fall no dollars representing the income of the taxpayer were brought into the United Kingdom over the material period.

For these reasons, in my view the appeal must be dismissed with costs.

Appeal dismissed.

Solicitors: *Solicitor of Inland Revenue; Vandercom, Stanton & Co.* (for the taxpayer).

[Reported by F. A. AMIES, ESQ., Barrister-at-Law.]

A

PAWSON AND OTHERS v. REVELL.

[COURT OF APPEAL (Jenkins, Parker and Pearce, L.J.J.), July 22, 23, 1958.]

B

Mortgage—Power of leasing—Validation of tenancy—Oral agreement by mortgagors for tenancy from year to year—Tenancy agreement containing no provision for re-entry—Whether tenancy validated—Law of Property Act, 1925 (15 & 16 Geo. 5 c. 20), s. 99 (7), (17), s. 152 (1), (6).

C

The owners of a farm mortgaged it in 1949. On June 23, 1953, they orally granted to the defendant a tenancy of the farm from year to year at a yearly rent of £100 payable quarterly. The agreement did not contain a condition for re-entry in the event of the rent not being paid within a specified time, as required by sub-s. (7) of s. 99* of the Act of 1925, that section being applicable, by sub-s. (17), to an oral letting so far as circumstances admitted. The mortgagees were not informed of the tenancy. On Mar. 2, 1956, the mortgagees obtained an order for possession of the farm against the mortgagors. In an action for possession against the defendant the mortgagees contended that the agreement of June 23, 1953, was not a valid exercise of the mortgagors' statutory powers of leasing under s. 99 in that it did not comply with s. 99 (7).

D

Held: the tenancy was valid because, even if the oral agreement of June 23, 1953, did not validly exercise the mortgagors' power of leasing under s. 99 of the Law of Property Act, 1925, by reason of the omission of any condition of re-entry that might be needed to comply with s. 99 (7) having regard to s. 99 (17), yet the exercise of the power of leasing was validated by s. 152 (1) of the Act of 1925, particularly in view of s. 152 (6).

E

Iron Trades Employers Insurance Assn., Ltd. v. Union Land & House Investors, Ltd. ([1937] 1 All E.R. 481) distinguished.

F

Per JENKINS, L.J.: so far as it is legitimate to look at the preamble to the Leases Act, 1849, for the purpose of construing s. 152 of the Law of Property Act, 1925, the mortgagors' ignorance of their true rights and consequent failure to include a condition of re-entry, when they intended to grant a valid tenancy, amounted to inadvertence, so as to bring the tenancy within s. 152 (see p. 239, letter I, post).

Appeal dismissed.

G

[As to the validation of defective leases, see 20 HALSBURY'S LAWS (2nd Edn.) 33, para. 39.

For the Law of Property Act, 1925, s. 99 and s. 152 (1) and (6), see 20 HALSBURY'S STATUTES (2nd Edn.) 641-650, 757, 758.

For the Agricultural Holdings Act, 1948, Sch. 7, para. 2 (1), see 28 HALSBURY'S STATUTES (2nd Edn.) 107.]

H

Cases referred to:

- (1) *Iron Trades Employers Insurance Assn., Ltd. v. Union Land & House Investors, Ltd.*, [1937] 1 All E.R. 481; [1937] Ch. 313; 106 L.J.Ch. 206; 156 L.T. 322; Digest Supp.
- (2) *Hallett to Martin*, (1883), 24 Ch.D. 624; 52 L.J.Ch. 804; 48 L.T. 894; 30 Digest (Repl.) 494, 1391.
- (3) *Gas Light & Coke Co. v. Towse*, (1887), 35 Ch.D. 519; 56 L.J.Ch. 889; 56 L.T. 602; 30 Digest (Repl.) 429, 723.
- (4) *Re Newell & Nevill's Contract*, [1900] 1 Ch. 90; sub nom. *Re Nevill & Newell's Contract*, 69 L.J.Ch. 94; 81 L.T. 581; 40 Digest 765, 2962.
- (5) *Brown v. Peto*, [1900] 1 Q.B. 346; 69 L.J.Q.B. 141; 82 L.T. 264; *affd.*, C.A., [1900] 2 Q.B. 653; 69 L.J.Q.B. 869; 83 L.T. 303; 31 Digest (Repl.) 245, 3803.

I

* The relevant terms of s. 99 and s. 152 are printed at pp. 235, 236, post.

Appeal.

The plaintiffs, who were suing as the trustees of the Hull Grand Division of the Order of the Sons of Temperance Friendly Society, appealed from a judgment of His Honour JUDGE HARPER, given at Kingston-upon-Hull County Court on Feb. 26, 1958, dismissing their action for possession of property known as Seaton Farm, Thorgumbald, in Yorkshire.

By a mortgage dated Apr. 11, 1949, and made between Samuel Edwin Nicholson and Millicent Nicholson his wife of the one part and the then trustees of the said society (herein called "the mortgagees") of the other part, Seaton Farm was mortgaged by demise by Mr. and Mrs. Nicholson, who were the owners of the farm in fee simple, to the mortgagees to secure repayment of £5,000 with interest. The mortgage contained a clause which excluded the powers of leasing conferred on mortgagors by s. 99 of the Law of Property Act, 1925. Notwithstanding this clause it was open to the mortgagors to grant a tenancy of the farm which would be binding on the mortgagees if it complied with the requirements of s. 99 because the clause excluding that power was, in effect, nullified by the Agricultural Holdings Act, 1948, Sch. 7, para. 2, since the property mortgaged was an agricultural holding. On June 23, 1953, Mr. and Mrs. Nicholson orally agreed to let the farm to the defendant as tenant from year to year at a rent of £100 yearly payable quarterly. Nothing was said as to a provision for re-entry on non-payment of rent. On Dec. 6, 1955, the mortgagees issued an originating summons in the Chancery Division of the High Court against Mr. and Mrs. Nicholson claiming, among other relief, possession of the farm. On Mar. 2, 1956, an order was made that within forty-two days after service of the order Mr. Nicholson should deliver possession to the mortgagees. The order was served on Apr. 16, 1956. The defendant was in possession of the farm and the mortgagees became aware that she claimed to be in possession as tenant. The mortgagees served on the defendant a notice dated Nov. 27, 1956, pursuant to s. 66 of the Agricultural Holdings Act, 1948, giving notice of the order obtained against Mr. and Mrs. Nicholson and requiring the defendant to deliver up possession of the property on June 24, 1957. The defendant did not give up possession. The mortgagees brought an action in the county court against the defendant claiming possession of the farm and damages or mesne profits from June 24, 1957, and pleaded that she claimed to be in possession as tenant but that they did not know the terms of her tenancy. By her defence the defendant pleaded the oral contract of tenancy previously mentioned and that her tenancy had not been duly determined and was subsisting. She contended that the tenancy took effect as an exercise by Mr. and Mrs. Nicholson of their statutory leasing powers and was binding on the mortgagees. The mortgagees contended that the letting to the defendant was not a letting in exercise of the statutory powers of leasing but was a letting at common law which was ineffective so far as the mortgagees were concerned, though it bound the interests of the mortgagors, Mr. and Mrs. Nicholson. The action was tried on Feb. 26, 1958, when it was dismissed. By their notice of appeal the mortgagees asked that the judgment should be set aside and that judgment should be entered that they recover possession. The grounds of the appeal were that the county court judge was wrong in law in holding that the defendant had a tenancy of the farm which was binding on the mortgagees; that he was wrong in law in holding that the tenancy was granted by Mr. and Mrs. Nicholson in exercising of powers of leasing conferred by s. 99 of the Law of Property Act, 1925, and was wrong in law in holding that the absence of a re-entry clause from the terms of the tenancy could be overcome under s. 152 of the Law of Property Act, 1925.

N. F. Stogdon for the plaintiffs, the mortgagees.

Raymond Walton and *J. B. Mortimer* for the defendant, the tenant.

JENKINS, L.J., after stating that the sole question was whether the tenancy granted by the mortgagors, Mr. and Mrs. Nicholson, to the defendant was binding

A on the mortgagees, and after briefly referring to the facts, continued: I should refer to the statutory powers of leasing conferred on mortgagors by s. 99 of the Law of Property Act, 1925, because the case of counsel for the mortgagees is founded on the submission that the oral tenancy did not comply with the terms of that section. Section 99 (1) provides:

B "A mortgagor of land while in possession shall, as against every incumbrancer, have power to make from time to time any such lease of the mortgaged land, or any part thereof, as is by this section authorised."

Section 99 (2) deals with the powers of the mortgagee. Section 99 (3) reads:

C "The leases which this section authorises are—(i) agricultural or occupation leases for any term not exceeding twenty-one years, or, in the case of a mortgage made after the commencement of this Act, fifty years; and (ii) building leases [with which we are not concerned] . . ."

Section 99 (4) reads: "Every person making a lease under this section may execute and do all assurances and things necessary or proper in that behalf". Nothing turns on that. Section 99 (5) reads: "Every such lease shall be made to take effect in possession not later than twelve months after its date". Again D nothing turns on that. Section 99 (6) reads:

"Every such lease shall reserve the best rent that can reasonably be obtained, regard being had to the circumstances of the case, but without any fine being taken."

E It is not disputed that the £100 a year reserved by the oral tenancy is anything less than the best rent which could reasonably be obtained.

Then comes s. 99 (7), the provision which is chiefly material for the present purpose:

"Every such lease shall contain a covenant by the lessee for payment of the rent, and a condition of re-entry on the rent not being paid within a time therein specified not exceeding thirty days."

F Then there is a provision in s. 99 (8) that a counterpart of every such lease shall be executed by the lessee and delivered to the lessor. I can pass over sub-s. (9) and sub-s. (10). Then sub-s. (11), sub-s. (12) and sub-s. (13) read:

G "(11) In case of a lease by the mortgagor, he shall, within one month after making the lease, deliver to the mortgagee, or, where there are more than one, to the mortgagee first in priority, a counterpart of the lease duly executed by the lessee, but the lessee shall not be concerned to see that this provision is complied with.

"(12) A contract to make or accept a lease under this section may be enforced by or against every person on whom the lease if granted would be binding.

H "(13) This section applies only if and as far as a contrary intention is not expressed by the mortgagor and mortgagee in the mortgage deed, or otherwise in writing, and has effect subject to the terms of the mortgage deed or of any such writing and to the provisions therein contained."

Section 99 (13) is the provision which has been rendered inoperative so far as mortgages of agricultural holdings are concerned*. I need not trouble with sub-s.

I (14), sub-s. (15) and sub-s. (16). Section 99 (17) is of importance:

"The provisions of this section referring to a lease shall be construed to extend and apply, as far as circumstances admit, to any letting, and to an agreement, whether in writing or not, for leasing or letting."

One of the matters which has been debated before us is whether, having regard

* Schedule 7, para. 2 (1) to the Agricultural Holdings Act, 1948, provides that s. 99 (13) shall not have effect in relation to a mortgage made after Mar. 1, 1948, of agricultural land within the meaning of the Agriculture Act, 1947.

to the terms of s. 99 (17), it is indispensably necessary that an oral agreement should include a condition of re-entry as stipulated in s. 99 (7), or whether that is rendered unnecessary by the words "as far as circumstances admit" contained in s. 99 (17). It is plain that so far, at all events, as a lease in writing is concerned, it must contain the condition stipulated in sub-s. (7), and there appears to me to be no doubt that the omission from a lease in writing of a condition of re-entry would be a defect sufficient to take the letting in question out of the scope of the power. The basis of the submission of counsel for the mortgagees is that, notwithstanding that this was an oral tenancy and, as such, clearly exempted by sub-s. (17) from requirements such as those contained in sub-s. (8) and sub-s. (11), it ought to have included the condition for re-entry prescribed by sub-s. (7). On the other side, it is said that that may or may not be so, but, if it is so, then any consequent invalidity of the tenancy agreement is cured by the provisions of s. 152 of the Law of Property Act, 1925. That section is the successor of the Leases Acts of 1849 and 1850, and I should next read some parts of it. Section 152 (1) provides:

"Where in the intended exercise of any power of leasing, whether conferred by an Act of Parliament or any other instrument, a lease (in this section referred to as an invalid lease) is granted, which by reason of any failure to comply with the terms of the power is invalid, then—(a) as against the person entitled after the determination of the interest of the grantor to the reversion; or (b) as against any other person who, subject to any lease properly granted under the power, would have been entitled to the land comprised in the lease; the lease, if it was made in good faith, and the lessee has entered thereunder, shall take effect in equity as a contract for the grant, at the request of the lessee, of a valid lease under the power, of like effect as the invalid lease, subject to such variations as may be necessary in order to comply with the terms of the power . . ."

Then there is a proviso with which I need not trouble, and I can pass to sub-s. (6):

"Where a valid power of leasing is vested in or may be exercised by a person who grants a lease which, by reason of the determination of the interest of the grantor or otherwise, cannot have effect and continuance according to the terms thereof independently of the power, the lease shall for the purposes of this section be deemed to have been granted in the intended exercise of the power although the power is not referred to in the lease."

A first reading of the provisions of s. 99 and s. 152 to which I have referred, without regard to any authority but simply reading the language of the two sections as they stand, would seem to indicate that, if the oral tenancy agreement in this case was invalid as a lease granted in exercise of the mortgagor's power of leasing, it was validated by the provisions of s. 152 (1) and (6), and the effect of s. 152 (1) would be to make the oral tenancy agreement

" . . . take effect in equity as a contract for the grant, at the request of the lessee, of a valid lease under the power, of like effect as the invalid lease, subject to such variations as may be necessary in order to comply with the terms of the power . . ."

—the one and only variation necessary for that purpose, as I understand the position, being the inclusion of a condition of re-entry on non-payment of rent as required by s. 99 (7).

I have said enough to show that, to my mind, the obstacles confronting counsel for the mortgagees in seeking to make good his contention are formidable indeed, but he has, nevertheless, presented his case in a very clear and forceful manner, and we are indebted to him for his assistance. He starts by saying that in all the circumstances of this case no intention to exercise the statutory power can properly be inferred. He says that this was an informal arrangement, and he

A might have said, I think, a "hole and corner" arrangement, between Mr. Nicholson and his housekeeper. Its very informality and the fact that it was not made known to the mortgagees until this present action was actually in progress are (says counsel) indications that this was a mere informal arrangement made without regard to the statutory provisions to which a lease granted by the mortgagors must conform in order to make it binding on the mortgagees. He says, therefore, **B** that this must be regarded simply as a letting at common law. Then, as to the validating provisions of s. 152, counsel referred us to the preamble in the Leases Act, 1849. That preamble begins:

"Whereas through mistake or inadvertence on the part of persons granting leases, and through ignorance on the part of lessees of the titles of persons from whom leases are accepted, leases granted by persons having valid powers of leasing are frequently invalid as against the successors in estate of such persons by reason of the non-observance or omission of some condition or restriction, or by reason of some other deviation from the terms of such powers . . ."

It is unnecessary for me to read further.

D Counsel for the mortgagees fastened on the words "mistake or inadvertence" and said that there was nothing amounting in this case to inadvertence or mistake: here the parties intended simply that the defendant should have an informal oral tenancy; they were ignorant of, and there was no intention to exercise, the mortgagors' leasing power. In my view, that submission is really demolished by the plain terms of s. 152 (6), the effect of which is that, where a person grants a lease **E** which he can only grant as a valid lease in exercise of the power, he is to be deemed to have granted it in intended exercise of the power. The clear words of that subsection, as I think, require us to impute, for the purposes of validation, an intention on the part of the mortgagors in this case to exercise the power. As to the use of the phrase "mistake or inadvertence" in the preamble to the Act of 1849, counsel for the defendant said that the point sought to be made of these words **F** by counsel for the mortgagees was more than offset by the reference to ignorance on the part of lessees of the title of persons from whom leases are accepted, and I should also note that, with respect to the types of error which might give rise to a case for validation, counsel for the defendant called attention to the words "by reason of the non-observance or omission of some condition or restriction."

G Then counsel for the mortgagees said, in effect, that, where a lease was made in terms exceeding the statutory power, it ought, prima facie at all events, to be regarded as a mere grant of a tenancy at common law, and in support of that submission he referred us to *Iron Trades Employers Insurance Assn., Ltd. v. Union Land & House Investors, Ltd.* (1) ([1937] 1 All E.R. 481), in which the leasing powers of mortgagors were discussed at some length by FARWELL, J. Counsel's proposition on this part of the argument was, in effect, this: so soon **H** as it is found that there is any omission from a lease by a mortgagor of anything required to be included by s. 99 of the Act of 1925 or that the mortgagor has failed to do something required to be done under that section, then the lease should not be regarded as made in purported exercise of the power for the purpose of validation under s. 152. It seems to me that, if one accepted that proposition, at all events in the broad form in which it was put by counsel, **I** s. 152 would be deprived of practically the whole of its effect. In my view, nothing said by FARWELL, J., in *Iron Trades Employers Insurance Assn., Ltd. v. Union Land & House Investors, Ltd.* (1) bears out that broad proposition. In that case the facts were these. By a legal charge dated Oct. 1, 1935, the defendants charged by way of legal mortgage certain freehold properties to the plaintiffs, and they covenanted with the plaintiffs that they would not, except with the previous written consent of the plaintiffs, exercise the power of leasing or agreeing to lease or of accepting surrenders of leases conferred

by the Law of Property Act, 1925, on a mortgagor while in possession. Then there was a letting on Oct. 8, 1935, in connexion with which the plaintiffs were not asked for and did not give their consent, and the decision was that the defendants, in granting the lease of Oct. 8, were not exercising their statutory power, and that consequently they did not commit any breach of the covenant contained in the legal charge of Oct. 1. Counsel for the mortgagees said that the effect of that case is that the mortgagors, having failed to comply with the terms of their power, were treated accordingly as exercising merely their common law power of letting which would not bind the mortgagees. I think, however, that the true effect of the judgment in that case was as stated by counsel for the defendant, in the course of his argument. He said that there were two points in the judgment: the first was that the mortgagors had no power at all to lease without the consent of the mortgagees, and the second was that, having no such power, they could not, by recourse to s. 152, create a power which did not exist. There being no power to lease without consent and that non-existent power being the power which they purported to exercise, it is plain that the case was not one to which s. 152 could apply. Accordingly, in my view that case does not advance the argument of counsel for the mortgagees.

Counsel then referred us to a number of authorities showing that s. 152 and its statutory precursors did not go the length of creating a substantially different lease from the lease purported to have been granted in exercise of the power. I do not propose to refer to these cases at any length. I might mention first *Hallett to Martin* (2) ((1883), 24 Ch.D. 624), which was cited for this statement by KAY, J. (*ibid.*, at p. 632):

"I must say I think this lease in any view of the case is bad and invalid, as departing, not in a mere formal manner, from the terms of the power but departing from them in essential respects."

Then in *Gas Light & Coke Co. v. Towse* (3) ((1887), 35 Ch.D. 519), which was another decision of KAY, J., the learned judge referred (*ibid.*, at p. 539) to the preamble to the Leases Act, 1849, and continued (*ibid.*, at p. 540):

"Now, has there been here any 'mistake', or 'inadvertence', or 'ignorance on the part of the lessees' of the title? Nothing of the kind."

Then, later in his judgment, he said (*ibid.*):

"There is no 'mistake', no 'inadvertence', no 'ignorance of title', nothing whatever which would enable me to apply the terms of that Act to this lease. I cannot find any defect; I find that the parties deliberately, voluntarily, knowing exactly what the powers were, chose to take their lease in this form. I am quite unable to see any defect, any mistake, any inadvertence, or anything whatever to induce me to alter the form of the lease in any respect. So much for that objection."

As to the other cases cited by counsel for the mortgagees, I shall confine myself to making brief references to the following. *Re Newell & Nevill's Contract* (4) ([1900] 1 Ch. 90) concerned a lease granted by a tenant for life of the surface, reserving the minerals, where there was no power for him to grant such a lease. It is obvious that the difference there between the lease purported to have been granted and the lease which the tenant for life had power to grant was clearly a most substantial matter. Then there was *Brown v. Peto* (5) ([1900] 1 Q.B. 346), where a lease included furniture and sporting rights as well as land, and the whole was let at one rent without distinguishing what portion of it was attributable to such things as the furniture. That again was obviously a very different case from the present, because the lease, when validated, would be substantially different from the lease purported to have been granted. I find nothing in those authorities, or in any other authority

A cited to us, to warrant the view that the variation of the oral tenancy agreement which is here in contemplation, namely, the insertion of the condition of re-entry required by s. 99 (7) of the Act of 1925, involves a substantial departure from the terms of the agreement. It is wholly different from cases such as those concerning the omission of covenants to erect buildings or some matter of that sort. The condition here in question may be described as a common form condition which is ancillary to the other provisions of the lease and is commonly regarded as necessary to make a lease of given property a proper lease of that property. There is no doubt that s. 152 contemplates the variation of the provisions of a lease where that is necessary in order to bring it within the terms of the section, and it appears to me that a provision such as this condition of re-entry is exactly the sort of provision, the inclusion of which, when necessary in order to validate the lease, was contemplated by s. 152.

I now return to what are really the two points in the case. First, where there is an oral tenancy agreement by a mortgagor, is it necessary for its validity under s. 99 (17) that it should include the condition of re-entry stipulated in s. 99 (7)? This is a short but, to my mind, not an easy point. In *WOLSTENHOLME AND CHERRY'S CONVEYANCING STATUTES* (12th Edn.) (1932), vol. 1, p. 400, there is this note to s. 99 (17):

“Parol agreement. The effect of the words ‘as far as circumstances admit’, is that sub-ss. (7) and (8) as to covenants, conditions of re-entry, and counterparts do not apply to a parol agreement, and sub-s. (7) as to covenants does not apply to an agreement in writing, except that there ought to be the nearest approach to a covenant, namely, an agreement to pay rent.”

Thus the learned authors of this particular text-book state categorically the view that a condition of re-entry is not required in such a case. But I am not wholly satisfied of that. The only condition of re-entry required is a condition of re-entry on the rent not being paid within a time therein specified not exceeding thirty days. I suppose s. 99 (7) could be satisfied by a short condition simply in the terms there laid down. A simple provision of that sort would be as easy to include in an oral tenancy agreement as a provision for the payment of rent on the four usual quarter days. The matter seems to me to be open to doubt and I prefer to express no opinion on it. Assuming, without deciding, that a condition of re-entry is required in the case of an oral agreement notwithstanding s. 99 (17), and assuming further, as I think is right, that that omission, if the condition was necessary to be included, would suffice to prevent the agreement being a valid exercise of the mortgagor's power, nevertheless it appears to me that a clear case is here made out for validation of the agreement by recourse to s. 152.

I should perhaps add one word about “inadvertence”. It appears to me that the proper inference from the facts is that the mortgagors intended to give the defendant a tenancy which would be valid as against all the world so far as they were able to do that. They may well have been unaware of the existence of any special power of leasing. They may have merely assumed that any mortgagor could grant a tenancy. I think that their ignorance of their true rights in the matter and their consequent failure to include the condition of re-entry, which, I am assuming but not deciding, should have been included in the oral agreement, amounted to inadvertence within the meaning of the preamble to the Act of 1849, so that, so far as it is legitimate to look at the preamble to the Act of 1849 for the purpose of construing s. 152, I do not think that there is anything in that expression to prevent the application of s. 152. If the facts of this case did not amount to inadvertence, I find it very difficult to see how a case of inadvertence could ever be made out. A

man granting an interest in land and failing to grant the interest which he intended to grant through non-compliance with a power, the existence of which he may have been ignorant of or may have forgotten or overlooked, is acting, I think, through inadvertence in any ordinary meaning of that expression. I hope that I have now covered all the essential points in this somewhat unusual case, and for the reasons which I have endeavoured to state, I think that this appeal fails and should be dismissed.

PARKER, L.J.: I agree that this appeal fails and for the reasons given by my Lord. I would only add that, in my view, the real clue to the decision in this case is to be found in s. 152 (6) of the Law of Property Act, 1925. Once the conditions set out in that sub-section are found to exist, and they clearly do exist in the present case, then "the lease shall for the purposes of [that] section be deemed to have been granted in the intended exercise of the power". Accordingly, once that stage is reached, the power to vary the invalid lease by curing defects in it arises under s. 152 (1). For the reasons given by my Lord, once that stage is reached, I think that, whether one looks at the preamble to the Leases Act, 1849, or not, it is plain that there is power under s. 152 to vary the lease by supplying a condition of re-entry as required by s. 99 (7) of the Act of 1925.

PEARCE, L.J.: I agree.

Appeal dismissed.

Solicitors: *F. Wilberforce Bridge*, agent for *Richard Witty & Co.*, Hull (for the plaintiffs); *Smith & Hudson*, agents for *Payne & Payne*, Hull (for the defendant).

[Reported by HENRY SUMMERFIELD, Esq., Barrister-at-Law.]

PRACTICE DIRECTION.

PROBATE, DIVORCE AND ADMIRALTY DIVISION.

Divorce—Insanity—Guardian ad litem—Appointment of Official Solicitor in suits based on incurable unsoundness of mind—Matrimonial Causes Act, 1950 (14 Geo. 6 c. 25), s. 1—Divorce (Insanity and Desertion) Act, 1958 (6 & 7 Eliz. 2 c. 54)—Matrimonial Causes Rules, 1957 (S.I. 1957 No. 619), r. 66 (8), (9).

The extension by the Divorce (Insanity and Desertion) Act, 1958, of the definition of care and treatment for the purposes of s. 1 of the Matrimonial Causes Act, 1950, has created a class of case in which a petition for divorce can be founded on incurable unsoundness of mind but the Official Solicitor is not automatically the guardian of the respondent under Matrimonial Causes Rules, 1957, r. 66 (8).

In such cases an application under r. 66 (9) for the appointment of the Official Solicitor as guardian may on his written consent be made ex parte to the registrar for the day.

Aug. 6, 1958.

B. LONG,
Senior Registrar.

A

IDDENDEN (otherwise BRIANS) (by her next friend)
v. IDDENDEN.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Collingwood, J.), July 21, 22, 1958.]

B

Nullity—Practice—Petition alleging fits of epilepsy and wilful refusal to consummate marriage—Cross-charge of wilful refusal to consummate marriage—Finding that respondent subject to recurrent fits of epilepsy at time of marriage—Question of wilful refusal to consummate not investigated—Matrimonial Causes Act, 1950 (14 Geo. 6 c. 25), s. 8 (1) (b).

C

Where, in a nullity suit, the court finds that one party to the marriage was at the time of the marriage subject to recurrent fits of epilepsy entitling the other party to a decree under s. 8 (1) (b) of the Matrimonial Causes Act, 1950, the court will not proceed to investigate cross-charges of wilful refusal to consummate the marriage.

D

[As to the voidability of marriage on grounds of wilful refusal to consummate marriage and of recurrent fits of epilepsy at time of marriage, see 12 HALSBURY'S LAWS (3rd Edn.) 225, para. 421, notes (r) (u); and for cases on the subject of wilful refusal, see 27 DIGEST (Repl.) 280, 281, 2252-2259.

For the Matrimonial Causes Act, 1950, s. 8 (1), see 29 HALSBURY'S STATUTES (2nd Edn.) 397.]

E

Petition.

This was a petition for nullity brought by the wife, an infant suing by her next friend. The parties went through a ceremony of marriage on Mar. 3, 1956, the husband being then twenty-one and the wife eighteen years of age. Immediately before the marriage ceremony took place the husband collapsed in some sort of fit similar to one which he had had in the wife's mother's house in December, 1955.

F

The marriage was never consummated and in April, 1956, the wife left the husband. By her petition dated Nov. 30, 1956, the wife sought a decree of nullity on the grounds (i) that the husband had been guilty of wilful refusal to consummate the marriage (ii) that the husband was at the time of the marriage and had ever since been incapable of consummating the marriage and (iii) that the husband was at the time of the marriage subject to recurrent fits of epilepsy.

G

By his answer dated Feb. 23, 1958, the husband admitted that the marriage had never been consummated but denied that that was due to his wilful refusal or incapacity and he further denied that at the time of the marriage he was subject to recurrent fits of epilepsy. The husband alleged that the non-consummation was due to the wife's wilful refusal or incapacity and cross-prayed for a declaration of nullity. By her reply the wife denied the alleged wilful refusal or incapacity on her part.

H

At the hearing of the suit counsel for both parties asked HIS LORDSHIP to try the issue as to recurrent fits of epilepsy first.

N. Leron for the wife.

I

L. J. Solley for the husband.

July 22. COLLINGWOOD, J., having found that the husband was suffering from recurrent fits of epilepsy at the time of the marriage and that the wife was then ignorant of the facts alleged and that, since the proceedings had been instituted within a year of the date of the marriage and there had been no marital intercourse, the wife was entitled to a decree under s. 8 (1) (b) of the Matrimonial Causes Act, 1950, said: I was asked by counsel for the husband to continue the hearing with a view to deciding whether either party had been guilty of wilful

refusal to consummate the marriage, there being now no question of incapacity on either side. I think that counsel for the wife is right in the answer which he gave to that suggestion. It would in my opinion be quite unreal for the court, having found that the husband was suffering from recurrent fits of epilepsy at the time when the wife's right to relief crystallised, viz., the time of the marriage, then to proceed to investigate the question of wilful refusal.

The wife is therefore entitled to a decree of nullity under s. 8 (1) (b) of the Matrimonial Causes Act, 1950.

Order accordingly.

Solicitors: *Edward F. Iwi*, agent for *Hanchett Copley & Hails*, Edgware (for the wife); *Pearce & Sons* (for the husband).

[Reported by A. T. HOOLAHAN, ESQ., Barrister-at-Law.]

NOTE.

GREEN v. GREEN AND PARTRIDGE.

[BIRMINGHAM ASSIZES (Karminski, J.), July 8, 9, 1958.]

Divorce—Condonation—Revival of adultery—Revival by conduct less than adultery—Husband's improper association with named women—Need to serve notice of charges on named women.

Where a wife in a divorce suit alleges that the husband's condoned adultery has been revived by his subsequent misconduct and names women with whom she alleges that the husband had an improper, but not adulterous, association, endeavour should be made on the wife's behalf to serve notice of these charges on the women named to enable them to apply, if they so desire, for leave to intervene.

[**Editorial Note.** The Matrimonial Causes Act, 1950, s. 31, gives the court power to allow a person to intervene in a suit if it considers it to be in the interest of that person to be made a party: and see *D. v. D.* ([1952] 2 All E.R. 854).

As to right to become a party by intervention, see 12 HALSBURY'S LAWS (3rd Edn.) 329, para. 674, note (e); and as to service of proceedings on person named, see *ibid.*, 330, para. 674, notes (g) to (k); and for cases on the subject, see 27 DIGEST (Repl.) 463, 3993-3996 and Supplements.

As to revival of condoned adultery by subsequent misconduct, see 12 HALSBURY'S LAWS (3rd Edn.) 306, para. 609, notes (r), (s); and for cases on the subject, see 27 DIGEST (Repl.) 396, 397, 3263-3269, 410, 3388.

For the Matrimonial Causes Act, 1950, s. 31, see 29 HALSBURY'S STATUTES (2nd Edn.) 416.]

Petition.

In this case the husband petitioned for divorce on the ground of the wife's adultery with the co-respondent. By her answer, the wife denied adultery and cross-prayed for a divorce on the grounds of the husband's adultery condoned and revived by subsequent acts of adultery and associations with other women falling short of adultery. The husband by his reply admitted certain of the allegations of adultery but alleged that this admitted adultery had been condoned and not revived.

P. J. Cox for the husband.

D. E. Roberts for the wife.

The co-respondent appeared in person.

- A **KARMINSKI, J.**, in the course of his judgment said: The wife has always denied, and still denies, that she has ever committed adultery with the correspondent. She says that the husband undoubtedly committed adultery in 1944 or 1945. She got to know of that adultery, persuaded (not I think without difficulty) her husband to admit it, and thereafter forgave him and lived with him until in fact they separated in 1956. She says that the husband has revived the
- B condoned adultery by his subsequent conduct. First she relies on an association with a number of other women; they are five in succession starting in 1948 or thereabouts. I do not propose to give the names of these women in the course of my judgment and for this reason. In this case, unfortunately, no effort has been made to serve on these women notice of these charges; had that been done they might have applied for and have obtained leave to intervene. It is right to say
- C that one or two of them certainly seem to have disappeared, but I myself deplore the introduction of people in charges of this kind (admittedly short of adultery, but discreditable) without some effort to find them. I want to make it as clear as I can, that if I thought that the justice of the case had required it, I should have adjourned this matter for the service on the women who have been named in the answer, with possibly certain consequences as to costs against the person
- D alleging but not serving notice of these charges. For that reason I propose to refer to these women, when necessary, by their Christian names.

Solicitors: *Blythe, Owen George & Co.*, Coventry (for the husband); *H. T. Cooper*, Coventry (for the wife).

[Reported by MISS GWYNEDD LEWIS, *Barrister-at-Law.*]

E

- F **WILSON BROTHERS, LTD. v. EDWARDS (VALUATION OFFICER) AND ANOTHER.**
HUDSON'S BAY CO. v. THOMPSON (VALUATION OFFICER).
 [COURT OF APPEAL (Jenkins, Sellers and Pearce, L.J.J.), June 24, 25, 26, July 25, 1958.]

- G **WILSON BROTHERS, LTD. v. EDWARDS (VALUATION OFFICER) AND ANOTHER.**

Rates—De-rating—Industrial hereditament—Adapting for sale—Collation of greetings cards—Rating and Valuation (Apportionment) Act, 1928 (18 & 19 Geo. 5 c. 44), s. 3 (1), (2)—Factory and Workshop Act, 1901 (1 Edw. 7 c. 22), s. 149 (1).

H

A hereditament was used primarily for the collation of greetings cards. The cards came to the hereditament in sets of identical cards and were sorted by operatives into series by taking one card from each of several different sets, so that the series when made up contained cards which were all different. Purchasers would only buy cards which had been collated

I

Held: the hereditament was not an industrial hereditament within s. 3 (1), (2) of the Rating and Valuation (Apportionment) Act, 1928, since the process was not an adapting for sale of the "bulk" of the cards within the meaning of s. 149 (1) of the Factory and Workshop Act, 1901, but a mere prelude to distribution by arranging the cards for the purpose of the method of sale demanded by the trade, the article to be sold being a number of cards arranged in series and not a series of cards.

Fullers, Ltd. v. Squire ([1901] 2 K.B. 209), *Kaye v. Burrows* ([1931] All E.R. Rep. 242), and *Hines v. Eastern Counties Farmers' Co-operative Asscn., Ltd.* ([1931] All E.R. Rep. 242) distinguished.

PER CURIAM: in determining whether a hereditament is an industrial hereditament within the meaning of s. 3 of the Rating and Valuation (Apportionment) Act, 1928, it is legitimate to test the true character of the process to which articles are subjected on the hereditament by looking at their subsequent history in order to see if the process is an adapting for sale, notwithstanding the rule that the purposes of the occupation and use of the hereditament are determined by what happens to the articles therein (compare p. 259, letters D to G, post).

Appeal dismissed.

HUDSON'S BAY CO. v. THOMPSON (VALUATION OFFICER).

Rates—De-rating—Industrial hereditament—Adapting for sale—Sorting, grading and matching of skins—Rating and Valuation (Apportionment) Act, 1928 (18 & 19 Geo. 5 c. 44), s. 3 (1), (2)—Factory and Workshop Act, 1901 (1 Edw. 7 c. 22), s. 149 (1).

A hereditament was occupied and used by a company for the sorting, grading and matching of furs and for their arrangement in matched lots of skins of uniform grade for sale at the company's fur auctions. The skins were received from different trappers and breeders at the hereditament in unmatched, unsorted and ungraded parcels, which in that state would command a very poor price if saleable at all. The contents were checked with the invoices and each skin was marked so as to be identified as the property of the owner of that parcel and it remained so identified until sale. All the skins were then mixed up together regardless of ownership and subjected to a highly skilled process of sorting, grading and matching and they were ultimately made up into lots of matched and graded skins of uniform quality which included skins from several different trappers or breeders. The lots were sold at the company's periodical skin auctions at prices of so much per skin, and the owner of each skin in each lot received the appropriate price for his skin less commission, this method of disposal producing a far better price than sale by owners individually.

Held: the essential principle of the "bulk" cases (viz., that, in the adaptation for sale of a bulk received by the incorporation of its components in a different bulk sold, the components lost their identity in the new different bulk which was the thing sold) was inapplicable because in the present case the article sold consisted of each individual skin, the auctioneer selling each as agent for the vendor to whom it belonged (see p. 260, letters F to H, post); therefore no adapting of any article for sale was carried on at the hereditament, which accordingly was not used as a workshop (within the definition in s. 149 (1) of the Factory and Workshop Act, 1901) and thus was not an industrial hereditament within s. 3 (1), (2) of the Rating and Valuation (Apportionment) Act, 1928.

Kaye v. Burrows ([1931] All E.R. Rep. 242), *Hines v. Eastern Counties Farmers' Co-operative Asscn., Ltd.* ([1931] All E.R. Rep. 242) and *Weatherhead v. Bradford Assessment Committee* ([1931] 1 K.B. 505) distinguished.

Appeal dismissed.

[As to the definition of factory for the purposes of rating relief, extending to premises where articles are adapted for sale, see 27 HALSBURY'S LAWS (2nd Edn.) 441, para. 877.

As to the exclusion from rating relief of premises used for distribution, see

- A 27 HALSBURY'S LAWS (2nd Edn.) 452, para. 883, text and note (1); and for cases on the subject, see 38 DIGEST 457, 226, and DIGEST Supps.

For the Rating and Valuation (Apportionment) Act, 1928, s. 3 (1), (2), see 20 HALSBURY'S STATUTES (2nd Edn.) 176; and for the Factory and Workshop Act, 1901, s. 149 (1), see *ibid.* 180.]

B Cases referred to:

- (1) *Sedgwick (Camberwell Revenue Officer) v. Camberwell Assessment Committee & Watney, Combe, Reid & Co.*, [1931] All E.R. Rep. 242; [1931] A.C. 447; 100 L.J.K.B. 271; 145 L.T. 73; 95 J.P. 115; Digest Supp.
- (2) *Law v. Graham*, [1901] 2 K.B. 327; 70 L.J.K.B. 608; 84 L.T. 599; 65 J.P. 501; 24 Digest (Repl.) 1021, 4.

C

- (3) *Grove (Dudley Revenue Officer) v. Lloyd's British Testing Co., Ltd.*, [1931] All E.R. Rep. 242; [1931] A.C. 450; 100 L.J.K.B. 271; 145 L.T. 73; 95 J.P. 115; Digest Supp.

- (4) *Kaye (Dewsbury Revenue Officer) v. Burrows & Dewsbury Assessment Committee*, [1931] All E.R. Rep. 242; [1931] A.C. 454; 100 L.J.K.B. 271; 145 L.T. 73; 95 J.P. 115; Digest Supp.

D

- (5) *Hines (Ipswich Revenue Officer) v. Eastern Counties Farmers' Co-operative Assn., Ltd.*, [1931] All E.R. Rep. 242; [1931] A.C. 456; 100 L.J.K.B. 271; 145 L.T. 73; 95 J.P. 115; Digest Supp.

- (6) *Cockram v. Tropical Preservation Co., Ltd.*, [1951] 2 All E.R. 520; [1951] 2 K.B. 827; 115 J.P. 459; 2nd Digest Supp.

E

- (7) *Bailey (Stoke-on-Trent Revenue Officer) v. Potteries Electric Traction Co., Ltd.*, [1931] 1 K.B. 388; *affd.* H.L. sub nom. *Potteries Electric Traction Co., Ltd. v. Bailey (Stoke-on-Trent Revenue Officer)*, [1931] A.C. 151; 100 L.J.K.B. 153; 144 L.T. 410; 95 J.P. 64; Digest Supp.

- (8) *Inland Revenue v. Maclachlans, Ltd.*, 1930 S.C. 449; Digest Supp.

- (9) *Inland Revenue v. Easson Bros.*, 1930 S.C. 480; Digest Supp.

F

- (10) *Fullers, Ltd. v. Squire*, [1901] 2 K.B. 209; 70 L.J.K.B. 689; 85 L.T. 249; 65 J.P. 660; 24 Digest (Repl.) 1025, 27.

- (11) *Weatherhead (Bradford Revenue Officer) v. Bradford Assessment Committee and Laycock, Son & Co., Ltd.*, [1931] 1 K.B. 505; 100 L.J.K.B. 1; 143 L.T. 650; 94 J.P. 177; Digest Supp.

G

- (12) *Pickin (Langbaurgh Revenue Officer) v. Langbaurgh Assessment Committee and Robert Cheyne & Co., Ltd.*, [1931] 1 K.B. 507; 100 L.J.K.B. 1; 143 L.T. 650; Digest Supp.

- (13) *Richardson & Son v. Middlesbrough Borough Assessment Committee*, [1947] 1 All E.R. 884; [1947] K.B. 958; 177 L.T. 103; 111 J.P. 357; 2nd Digest Supp.

H

- (14) *Valuation Comr. v. McAllister*, [1954] N.I. 54; 47 R. & I.T. 635; 3rd Digest Supp.

- (15) *East Kent Packers, Ltd. v. Buncombe*, (1952), 45 R. & I.T. 151.

- (16) *Jobling (James A.) & Co., Ltd. v. Sunderland County Borough Assessment Committee*, [1944] 1 All E.R. 500; 2nd Digest Supp.

- (17) *Davis Cohen & Sons, Ltd. v. Hall*, [1952] 1 All E.R. 157; 116 J.P. 49; 3rd Digest Supp.

I

Cases Stated.

The appellant ratepayers in the first appeal, Wilson Brothers, Ltd., appealed to the Lands Tribunal against a decision of a local valuation court of North East London Local Valuation Panel, directing that the ratepayers' hereditament at 76, 78 and 80, Great Eastern Street, London, E.C.2, should be entered in Part I of the valuation list for Shoreditch Metropolitan Borough with an assessment of £2,378 gross value, £1,978 rateable value. The ratepayers contended

that the hereditament was an industrial hereditament within the meaning of s. 3 of the Rating and Valuation (Apportionment) Act, 1928, and that the assessment should be transferred to Part II of the valuation list with an assessment of £2,378 gross value, £484 rateable value. On Dec. 21, 1956, the tribunal dismissed the appeal (1 R.R.C. 163), holding that the hereditament was not an industrial hereditament within the meaning of s. 3 of the Act of 1928. The ratepayers appealed to the Court of Appeal on the ground that the tribunal was wrong in law in so holding on the facts which it had found.

The appellants ratepayers in the second appeal appealed to the Lands Tribunal against a decision of a local valuation court of Central London Local Valuation Panel confirming the assessment of a hereditament described as warehouse, offices and cold store, Great Trinity Lane, 26-30 Little Trinity Lane, 1-13, Garlick Hill, and 1-6 Sugar Loaf Court, Beaver House, in Part I of the valuation list for the City of London at £15,818 gross value, £13,178 rateable value. The ratepayers contended that the property should be the subject of three separate assessments in the valuation list and that a carpenter's workshop and Beaver House should be entered in Part II of the valuation list. Alternatively they contended that the total hereditament as assessed in the valuation list should be transferred to Part II of the valuation list and should be assessed as follows: £15,816 gross value, £13,178 net annual value, industrial purposes—£7,674 net annual value, £1,918 rateable value, non-industrial purposes—£5,504 net annual value, £5,504 rateable value, £7,422 total rateable value. On Oct. 2, 1957, the Lands Tribunal dismissed the appeal, holding that the premises constituted a single hereditament and were not an industrial hereditament within the meaning of s. 3 of the Rating and Valuation (Apportionment) Act, 1928, requiring to be entered in Part II of the valuation list (2 R.R.C. 211). The ratepayers appealed to the Court of Appeal. They contended that there was no evidence on which the tribunal could make the findings of fact detailed in the Case Stated to support their decision that the hereditament was not an industrial hereditament within the meaning of the Act of 1928, and that on the facts set out in the Case Stated and annexures thereto the hereditament was in law an industrial hereditament.

Michael Rowe, Q.C., and *F. Mattar* for the ratepayers, Wilson Brothers, Ltd.

Michael Rowe, Q.C., and *W. L. Roots* for the ratepayers, Hudson's Bay Co.

Percy Lamb, Q.C., and *P. R. E. Browne* for Shoreditch Metropolitan Borough

Council and the valuation officer, Mr. Edwards.

J. P. Widgery, Q.C., for the valuation officer, Mr. Thompson.

Cur. adv. vult.

July 25. **JENKINS, L.J.:** The judgment that I am about to read is the judgment of the court in both of these cases. The two matters now before the court are (i) An appeal by the ratepayers, Wilson Bros., Ltd., of 76, 78 and 80, Great Eastern Street, London, E.C.2, by way of Case Stated from a decision of the Lands Tribunal affirming a decision of the local valuation court for North-East London to the effect that their premises should be entered in Part I of the valuation list for rating purposes, the ground of appeal being that the premises should be transferred to Part II of the valuation list, with consequential reductions in their rateable value, as an industrial hereditament within the meaning of s. 3 (1), (2) of the Rating and Valuation (Apportionment) Act, 1928; and (ii) An appeal by the ratepayers, Hudson's Bay Co., by way of Case Stated from a decision of the Lands Tribunal affirming a decision of the Central London Local Valuation Court which had confirmed the assessment of the whole of the ratepayers' premises in the City of London shortly described as "Beaver Hall,

A carpenter's workshop and Beaver House" in Part I of the valuation list, the ground of appeal being that the carpenter's workshop and Beaver House, or, alternatively, the whole of the premises, ought to be entered in Part II of the valuation list as industrial hereditaments within the meaning of s. 3 (1) of the Act of 1928, with consequential reductions in their rateable value.

B Section 3 (1) of the Act of 1928 provides as follows:

"In this Act the expression 'industrial hereditament' means a hereditament (not being a freight-transport hereditament) occupied and used as a mine or mineral railway or, subject as hereinafter provided, as a factory or workshop: Provided that the expression industrial hereditament does not include a hereditament occupied and used as a factory or workshop if it is primarily occupied and used for the following purposes or for any combination of such purposes, that is to say—(a) the purposes of a dwelling-house; (b) the purposes of a retail shop; (c) the purposes of distributive wholesale business; (d) purposes of storage; (e) the purposes of a public supply undertaking; (f) any other purposes, whether or not similar to any of the foregoing, which are not those of a factory or workshop."

Then there are provisions in sub-s. (2) with which we are not concerned except as regards the last few words which are:

"... but save as aforesaid, the expressions 'factory' and 'workshop' have respectively the same meanings as in the Factory and Workshop Acts, 1901 to 1920."

That is all I think I need read of s. 3 of the Act of 1928. Section 149 of the Factory and Workshop Act, 1901, contains inter alia definitions of the expressions "factory" and "workshop." In order to make premises a factory within the meaning of the Act, steam, water or other mechanical power must be used in aid of the manufacturing process carried on there. No form of mechanical power is used in either of the two cases now under consideration. Accordingly, there is no question of the premises concerned in either case being a factory within the meaning of the Act. We may therefore pass to the definition of the expression "workshop" in s. 149 (1), which is in these terms:

"The expression 'workshop' means—(a) any premises or places named in Part 2 of Sch. 6 to this Act which are not a factory; and (b) any premises, room or place, not being a factory, in which premises, room or place or within the close or curtilage or precincts of which premises any manual labour is exercised by way of trade or for purposes of gain in or incidental to any of the following purposes, namely—(i) the making of any article or of part of any article; or (ii) the altering, repairing, ornamenting or finishing of any article; or (iii) the adapting for sale of any article, and to or over which premises, room or place the employer of the persons working therein has the right of access or control."

I Both the present ratepayers found themselves on the contention that the activities carried on by them on the premises in question amount to the adapting of articles for sale within the meaning of the definition of "workshop" contained in s. 149 (1) of the Act of 1901.

The meaning of the words "the adapting for sale of any article" in that definition has been considered in a large number of cases and in relation to a wide variety of processes or activities, the chief source of authority being the well-known group of cases decided in 1931.

In *Sedgwick (Camberwell Revenue Officer) v. Camberwell Assessment Committee*

& Watney, Combe, Reid & Co. (1) ([1931] All E.R. Rep. 242), where the use to which the premises were put was the bottling of beer, VISCOUNT DUNEDIN said (*ibid.*, at p. 250):

"But without attempting any definition, which would be useless as one cannot have in one's mind all the instances which may arise, it is easy to conceive premises used primarily for arranging for the process of distribution. Nor do I doubt that, in the case of premises where nothing was done except the mere bottling of a liquid, such premises might be said to be of that character. An illustration of a case which looks like that may be found in *Law v. Graham* (2) ([1901] 2 K.B. 327), although the actual question for decision was whether the premises were a factory. But the point is whether the treatment that the beer undergoes in these premises is a mere prelude to distribution. I am clearly of opinion that it is not. The finished article that is being prepared for distribution is bottled beer. The beer does not enter the premises as bottled beer. It undergoes treatment, a treatment which changes its quality and makes it from an unpotable and unmarketable article into a potable and marketable one. It is true that the treatment requires the use of a bottle, and that, when the treatment is finished, the bottle and its contents are ready for distribution. But what is really done on the premises is the turning of what I may call an unfinished liquid into a finished one."

In *Grove (Dudley Revenue Officer) v. Lloyd's British Testing Co., Ltd.* (3) ([1931] All E.R. Rep. 242) (where the premises were used for the testing of cables and anchors) VISCOUNT DUNEDIN said (*ibid.*, at p. 252):

"I think 'adapting for sale' points clearly to something being done to the article in question which, in some way, makes it in itself a little different from what it was before. Now, testing does not in any way make the article different as an article from what it was before. It only proclaims its character."

In *Kaye (Dewsbury Revenue Officer) v. Burrows & Dewsbury Assessment Committee* (4) ([1931] All E.R. Rep. 242) (where the premises were used for sorting rags), and *Hines (Ipswich Revenue Officer) v. Eastern Counties Farmers' Co-operative Assn., Ltd.* (5) ([1931] All E.R. Rep. 242) (where the premises were used for cleaning seeds), VISCOUNT DUNEDIN said (*ibid.*, at p. 260):

"In both of these cases I agree with the Court of Appeal and approve the view of LORD SANDS in the passage quoted. The test is just as it was in the bottled beer case. You must look at what is the finished article to be turned out. If that finished article is only put into the condition of a finished article by the processes to which it has been subjected in the hereditament, then the processes will fall within the expression 'altering or adaptation for sale'."

And later he said (*ibid.*):

"In both the cases of the rags and the seeds the finished article is different from the article in bulk which enters the hereditament, and that is, in my opinion, an adaptation for sale. It is here that one gets the contrast with the cable testing case (3), for there is no difference, in that case, between the article, as an article, which enters and that which leaves the hereditament."

The passage from *Grove v. Lloyd's British Testing Co., Ltd.* (3), cited above, was referred to in these terms by LORD EVERSHERD, M.R., in *Cockram v. Tropical Preservation Co., Ltd.* (6) ([1951] 2 All E.R. 520 at p. 522):

- A "I respectfully accept that as being the test which we must apply in this case . . ."

In *Bailey (Stoke-on-Trent Revenue Officer) v. Potteries Electric Traction Co., Ltd.* (7) ([1931] 1 K.B. 388), SCRUTTON, L.J., said this of the class of case in which the process claimed to amount to an adaptation for sale consists of the sorting or separation of the article to be sold from a bulk of which the rag-sorting and seed-cleaning cases referred to above were examples (*ibid.*, at p. 494):

- B "In my view the question whether sorting or separation of an article to be sold from a bulk is an adapting for sale depends on the facts of each particular case, and cannot be determined simply by saying: 'no sorting is adaptation for sale.' The original bulk may be such that it cannot be sold either legally, as in mixed seeds, or commercially, because an unsorted bulk is not wanted, and the process of sorting may be so complicated and mechanical as to deserve the title of a manufacturing process, i.e., of 'adapting for sale.' On the other hand, the bulk and the article to be sold may be so similar and of such a nature, such as taking a quarter of a pound of bulls-eyes out of a bulk in a bottle, that the separation or sorting may well be regarded as an entirely minor incident of the sale or distribution. This view is indicated by LORD SANDS in *Inland Revenue v. MacLachlans, Ltd.* (8) (1930 S.C. 449 at p. 452): 'Primo loco, in considering whether premises fall within the definition of a factory or workshop, we have no concern with the complexity or the simplicity of the operation carried on, so long as that operation falls within the definition of adapting goods for sale, or, as the case may be under the statutory definition. The simplicity of the operation has no doubt been recognised as a factor where the question has arisen whether the operation is not just an incident in distributive wholesale business.' Where substantial changes are made in the article, as in the seed-cleaning case, I see no difficulty in holding the process to be adapting for sale. But in view of the fact that 'adapting for sale' is a separate head from altering, I see no reason for requiring alteration of substance to make 'adapting for sale.' If this were necessary, there would be no need to insert 'adapting for sale.' Where the process of separation or sorting is complicated and substantial, again I think there is adapting for sale. In many cases, it is a question of degree, which is in my view fact and not law, and not properly the subject of a Special Case. Further, the section in the Factory Act, 1901, deals with an 'article,' which I think means an article to be sold. A seed is never sold by itself commercially, and I think the article to be altered or adapted for sale is the article to be sold, i.e. a bulk, not an individual item which is never sold by itself. The bulk bought at one price is altered or adapted for sale into a bulk of smaller size and different character which can be sold because of the alteration or adaptation at a much higher price. It is this principle which I think should be applied to the various cases involving sorting, which I consider separately."

- I In *Kaye v. Burrows* (4) (the rag-sorting case) and *Hines v. Eastern Counties Farmers' Co-operative Assn., Ltd.* (5) (the seed-cleaning case), VISCOUNT DUNEDIN ([1931] All E.R. Rep. at p. 258) quoted with approval the following passage from the dissenting opinion of LORD SANDS in *Inland Revenue v. Easson Bros.* (9) (1930 S.C. 480) which had also been quoted with approval by GREER, L.J., in the Court of Appeal:

"On the counter emptied out of collecting carts there is a huge amorphous mass of waste paper, rags, etc., mixed with dirt and rubbish, which

no paper manufacturer would look at. The workers produce a number of orderly bales in eighty different classes which the papermakers readily buy for substantial sums. Can it reasonably be said that there has been no adaptation for sale of the mass of material which was emptied out of the carts, and which, so far as not discarded as dirt or rubbish, is now arranged in orderly merchantable bales? I understand the argument to be that, if you look at one particular rag or one particular scrap of paper, that rag or scrap of paper has not been subjected to any treatment which alters it or adapts it for sale. As it appears to me, this is an altogether artificial and superficial argument. The papermaker is not buying one rag or one piece of waste paper; he is buying a bale. If what had happened was that the papermaker had come into the premises saying I want a blue cotton rag or a piece of brown paper, I could understand the argument that there had been no adaptation of the particular article for sale. All that had been done was to arrange the articles so as to avoid the trouble of having to rummage through the heap whenever a papermaker comes in and asks for something. But that is not the condition of the problem. If one regards the whole mixed mass that comes into the works, that mass has been adapted for sale or made saleable by laborious assortment."

We take these citations as sufficient authority for the following propositions

(i) In order to amount to an adapting for sale of a given article the process to which it is subjected must work some change in the article itself which renders it saleable when unsaleable before or more readily saleable than it was before.

(ii) An article may be made saleable, or more readily saleable, by testing and certification but this in itself is not adaptation for sale, since no change is brought about in the article as such.

(iii) The sorting or separation of an article to be sold from a bulk may amount to an adapting of the article for sale where the article to be sold is a bulk, and considered as a bulk is substantially different from the original bulk although its constituent parts were included in the original bulk and have not in themselves been in any way changed.

But these are no more than broad general principles. Each case must depend on its own facts, which must be examined with some particularity. To this end we think it desirable to quote in extenso the findings of fact made by the tribunal in the present appeals rather than to attempt a summary or paraphrase of them.

We take first the case of Wilson Bros., Ltd. The decision of the Lands Tribunal annexed to the Case Stated (by the President, SIR WILLIAM FITZGERALD, who heard both cases) says this:

"The [ratepayers], Messrs. Wilson Brothers, are engaged in what I may call 'the greeting card and Christmas card business.' The area of the premises is some 46,000 sq. ft. They originally consisted of three separate four-storey buildings, they are now interconnected on all floors with the exception of the basements in Nos. 76 and 78. The operations carried on by the [ratepayers] can be classified as follows: (a) Ornamenting and ribboning Christmas cards; (b) storage of view cards, and (c) collating Christmas cards."

I then omit the passage dealing with counsel's contentions. The decision continues:

"The ornamenting of cards covers only 19.5 per cent. of the business. The collation of cards covers 65.5 per cent. of the business and cards not collated, that is the view cards, account for the other 15 per cent. of the business."

A Then a little further on the decision continues:

“These cards are printed outside the business and when they come from the printers they are what is known as ‘collated’ which is a type of sorting. 113 women are engaged in this sorting which appears to require no particular skill. There are 150 different series of cards and the process of collating appears to be to make them up in boxes not all the same cards but each box containing a quantity of different cards. It is an incidence of the Christmas card trade that the wholesalers will not buy cards except they are collated. Mr. Rouse, the chief buyer of Woolworths and Mr. Weissman, managing director of Post Card Stores, confirmed in their evidence that they would only buy cards from [the ratepayers] in a series, in other words they would only buy cards which had been collated. Collating was described by Mr. Reece, a chartered surveyor called by the [ratepayers], as follows: ‘It is a process done in this way. The operative sits at a bench with a number of piles of cards, each pile being of a particular design, and the process of collating consists of her taking one card off the first pile, one off the second, one off the third and so on and thus making up a dozen cards which are all different. Having made up these cards from the piles into a dozen different cards, the result is known as a ‘series’.”

Then in the Case Stated these further facts are set out:

“In addition to the facts proved or admitted which are set out in my decision, a signed copy of which is annexed hereto and forms part of this Case, I find the following to be further facts which were proved or admitted: (a) The total annual turnover of cards of all descriptions dealt with by the [ratepayers] amounts to 88,000,000. (b) Of this total 75,000,000 cards consist of greetings cards. This amounts to eighty-five per cent. of the total.

(c) Greetings cards consist of (i) Christmas cards; (ii) birthday cards; (iii) New Year cards; (iv) Easter cards; (v) Valentine cards; (vi) mother’s day cards; (vii) relation cards: twenty-seven different possible relationships being catered for. (d) Cards arrive at the hereditament from the printers in packages each generally containing between 400 and 1,000 cards of the same design. In the case of the greetings cards, these packages are opened on the hereditament and the cards ‘collated’ as described in my decision.

Cards are stored on the hereditament while waiting ‘collation’ and while awaiting sale or dispatch to the [ratepayers] customers. Cards sold by the [ratepayers] are packed, together with matching envelopes, on the hereditament, and thereafter are dispatched to customers. (e) The [ratepayers]’ business is entirely wholesale, their customers consisting of large retailers (multiple stores such as Woolworths, Boots and ‘Timothy White’s) and wholesalers. The [ratepayers]’ customers will only buy greetings cards from them in ‘series’ form—that is, in sets of (e.g.) a dozen cards each card being of a different design. The [ratepayers] make up and sell about 150 different ‘series’ of greetings cards, and only sell greetings cards when they have been ‘collated’—that is, arranged into one of these 150 ‘series’; all the cards referred to in sub-para. (c) above are ‘collated.’ The [ratepayers] do not sell greetings cards as single units.”

We turn next to the facts in the Hudson’s Bay Co.’s appeal as set out in the decision of the tribunal annexed to the Case Stated and amplified in the latter. Again we prefer to set them out in the President’s own words. The decision (at p. 2 et seq.) says this:

“The essential facts are these. Beaver House and Beaver Hall were both built about 1925 to 1927 by the [ratepayers]: the workshop is considerably

older. An agreed site plan was tendered. On that site plan Beaver House is coloured pink, Beaver Hall green, and the carpenter's workshop blue. All these properties have common walls and common services, but there is no actual intercommunication between them. Until 1940 the [ratepayers'] headquarters were at Bishopsgate, but in that year their headquarter administration moved into Beaver House: the object of the move being to get proper accommodation in the heart of the fur trade area centred on Garlick Hill. Beaver Hall is commonly known as the "fur trade sale room". The sales that are conducted in the hall are run by a committee which is known as the Committee of London Public Fur Sales. This committee operates under an agreement of 1937 made between the [ratepayers] and certain other companies and partnerships and it recites that the objects of the committee are the holding of public sales of furs upon the premises and their regulation, management and control as between members of all such sales. The enforcement and performance of rules are set out in Sch. 2. It provides that the committee shall in its absolute and exclusive discretion manage and control all public sales of furs held on the premises and shall permit sales of furs by auction to be held on the premises on convenient days and at convenient hours. The general effect of the agreement is that the main function of Beaver Hall is concerned with the holding of fur sales. Its control and management has been given to this committee in which is vested the entire management of such sales and which can decide when such sales are to take place and how many there shall be, and although the [ratepayers] remain the owners and normally the occupiers, the committee is the de facto body in running the fur sales. There is another agreement relating to Beaver Hall which concerns a company known as the Little Ship Club. This provides that the two rooms lying at the south end of the entrance hall, and the two small store rooms shall be available for the club all the year round. Another part of Beaver Hall is known as the Strathcona Room, which is let for 'company, public and society meetings, trade exhibitions, dances, etc.' "

The decision goes on to describe the use to which Beaver House is put, and by way of introduction states the ratepayers' contention to be that Beaver House is primarily occupied and used by the ratepayers for the sorting and grading of furs, that by means of that sorting and grading bales of unsorted and ungraded skins sent in by trappers and breeders from various parts of the world are changed into saleable lots of assorted and graded skins. The decision continues:

"It may be said therefore that the real issue upon which this case will depend is whether what is done to those skins is or is not adapting for sale within the meaning of the Factory Act. [Counsel for the ratepayers], with his usual candour, has admitted that if it is not an adapting for sale then he cannot see how he can win. The total area of Beaver House amounts to some 123,000 sq. ft. in round figures. The [ratepayers'] headquarter administrative offices occupy some 4,253 sq. ft. and the basement part of the premises occupying some 17,873 sq. ft. are used during the summer months for the storage of furs for private owners. At this point it may be convenient to describe in detail the various processes carried on at Beaver House from the arrival of the fur skins to their disposal at the auction held in the auction room there. Bales of skins are addressed from almost all parts of the world except the Soviet Union. They arrive in lorries at the reception basement. There they are unloaded on to lifts and conveyed to the first floor where the bales are opened and are sorted according to types—the bales consist of mixed skins of various animals. The sorted bundles are then passed up to

A the next floor, some of the skins which may be dusty or gritty are put in drums with clean sawdust and whirled round. This eliminates the dust and grit. This process is necessary only in the case of very few, indeed almost a negligible quantity, of the skins that come in. Next comes the process on which the [ratepayers] mainly rely to establish their contention that there is an adaptation for sale. The skins are passed along in trolleys to the
B sorters' counters. The counters extend along the room which is specially lighted with artificial light and large windows. The sorters are men who have been specially trained in the art of sorting. It is said that it takes about ten years to make a man an entirely efficient sorter. The sorter takes the skin and grades it either by its feel or visual appearance. Immediately
C behind the sorter is a trolley with various shelves. Each shelf represents the class which the sorter assigns to the skin. These grades of skin are then conveyed to another sorting room where there are sorters who can be described as final specialists. These sorters examine the skins and either confirm the grading or up or down grade the skins again. After this final grading the skins are catalogued and passed down to the display room. There they
D are displayed for some days and prospective buyers come along to examine them and bid for them at the auctions which are held about three times yearly. The skins are still in a raw state in the sense that they could not be used as furs. They have to undergo a highly technical process which converts them from skins into saleable furs. This process is not undertaken at Beaver House. It is carried out by the furriers who buy the skins at
E the auction."

In the Case Stated with respect to the Hudson's Bay Co. the facts are thus amplified in para. 3:

F "At the hearing before me the facts, which were proved or admitted, and the contentions put forward by the parties, are contained in my decision, a signed copy of which is annexed hereto and forms part of this Case, save that the following further facts were admitted although not referred to in my decision: (a) The carpenter's workshop is used exclusively for purposes connected with Beaver House and Beaver Hall, namely, the making and repairing of things for use on those premises and the storing of furniture
G surplus to the current requirements of those premises; (b) Very approximately twenty-five per cent. of the skins coming into Beaver House are owned by the [ratepayers] and seventy-five per cent. are owned by other persons; but these are variable figures; (c) Each skin (except musquash) is labelled on arrival in Beaver House with the object of making that skin
H identifiable as the property of a particular customer at all stages. Large numbers of musquash are dealt with but their value is small, both individually and collectively, in relation to the [ratepayers'] turnover. Usually one bale of musquash will provide one or two satisfactory lots, and the identity of these lots can be preserved without individual ticketing; (d) Some furs are sold by private treaty in Beaver House; nobody comes to buy furs
I at the auctions except with a view to re-sale, and the Committee of London Public Fur Sales does not regard a private individual as an authorised trader. In my decision, in the fifth paragraph on p. 3, the figure '123,000 sq. ft.' should read '114,000 sq. ft.'"

These being the facts of the two cases, we should next consider on those facts whether the use to which the premises in question are put by the ratepayers is such as to make them "industrial hereditaments" within the meaning of s. 3 (1) of the Act of 1928, as being premises occupied and used as a "workshop"

as defined in s. 149 (1) of the Act of 1901, on the ground that what is done there amounts to "the adapting for sale of any article" within the meaning of that definition. A

First as to Wilson Bros., Ltd. It was common ground in this case that the ornamenting and ribboning of cards is an "adapting for sale". It follows that part of the premises is used as a workshop and the question therefore is whether the premises are primarily so used. In view of the fact that eighty-five per cent. (if the cards ornamented and ribboned on the premises are included) of the total output of cards are subjected to the operation of collation, it seems clear that this must be taken as the purpose for which the premises are primarily used. Accordingly, as it seems to us, this appeal can only succeed if the operation of collating cards amounts to the adapting of them for sale within the meaning of the statutory provisions to which we have referred. B C

In his argument in support of the appeal counsel for the ratepayers put this as a "bulk" case comparable to the rag-sorting (*Kaye v. Burrows*) (4) and seed-cleaning (*Hines v. Eastern Counties Farmers' Co-operative Assn., Ltd.*) (5) cases cited above and falling within the third of the general principles we have stated. He referred to several cases of the "bulk" type besides those already mentioned. He relied in particular on the old case of *Fullers, Ltd. v. Squire* (10) ([1901] 2 K.B. 209), which concerned a conviction under the Factory and Workshop Act, 1878, in respect of the employment of a woman named Ada Simmonds after the legal period of employment. The work which the woman had been doing (from 1 p.m. on Dec. 19 to 3 a.m. on Dec. 20, 1900) is thus described in the report: D E

"For the purposes of the last-mentioned employment Ada Simmonds was furnished by the appellants with an assortment of bonbons and sweetmeats of various sizes and colours, also with cardboard boxes, ornamental wicker hampers, ribbons of various sizes and colours, and fancy lace paper necessary for her work hereinafter described. From 1 p.m. on Dec. 19 until 3 a.m. on Dec. 20 Ada Simmonds was chiefly engaged in packing and arranging in layers in the cardboard boxes and ornamental hampers an assortment of bonbons and sweetmeats of different colours, shapes, and sizes, in fancy patterns, placing sheets of lace paper between each layer of sweetmeats or bonbons, tying up the hampers and boxes when so filled with the fancy ribbons, and in arranging them with bows on the outside of the boxes and hampers with a view to rendering them more attractive to purchasers than they would be if not so tastefully arranged, sorted and packed and bound up; and the magistrate found as a fact that they were so rendered more attractive by the work so expended upon them, and that the work was work requiring skill and taste on the part of Ada Simmonds." F G H

The matter came before the Divisional Court by way of Case Stated by a metropolitan police magistrate, who, subject to the opinion of the court on the Case Stated, had convicted the employers. In his judgment, in which LAWRENCE, J., concurred, LORD ALVERSTONE, C.J., said this (*ibid.*, at p. 211): I

"The only question we have to decide is whether there was evidence on which the magistrate could come to the conclusion that he did. I think there was. What was being prepared for sale was boxes of sweetmeats, and the operation of putting the sweetmeats in layers with ornamental papers between them and ornamenting the boxes afterwards was an adapting of them for sale within the meaning of the section."

The conviction of the employers was accordingly upheld.

- A Counsel for the ratepayers also referred us to *Weatherhead (Bradford Revenue Officer) v. Bradford Assessment Committee and Laycock, Son & Co., Ltd.* (11) ([1931] 1 K.B. 505), the wool-sorting case, in which SCRUTTON, L.J., said this (*ibid.*, at p. 506):

- B “ Apart from this, it appears to me that the ‘ matching ’ which leaves the hereditament is a substantially different article from the various fleeces which entered it. Each hair is no doubt the same, but one does not buy single hairs; one buys ‘ matchings,’ which are made out of, but different from, fleeces. That the process is for the purpose of ultimate wholesale distribution appears to me for the reasons already stated immaterial. The primary purpose of the hereditament is the factory purpose of making ‘ matchings,’ a
- C different article from the fleeces out of which ‘ matchings ’ are made.”

- Counsel for the ratepayers added as a further example from the 1931 group of cases *Pickin (Langbaugh Revenue Officer) v. Langbaugh Assessment Committee and Robert Cheyne & Co., Ltd.* (12) ([1931] 1 K.B. 507), the scrap-metal case, where the breaking up into pieces of a suitable size of miscellaneous metal articles
- D such as old machinery, boilers, ships’ propellers and the like was held to be an adapting for sale.

- Nearer to the present case than the two last cited are the egg (13), (14) and apple (15) sorting cases to which counsel for the ratepayers also referred. The egg cases to which he made reference were *Richardson & Son v. Middlesbrough Borough Assessment Committee* (13) ([1947] 1 All E.R. 884), and the Irish case of *Valuation Comr. v. McAllister* (14) ((1954), 47 R. & I.T. 635). In the former
- E case LORD GODDARD, C.J., said this ([1947] 1 All E.R. at p. 885):

- “ I base my judgment on the ground that there is here a process of adapting for sale. The eggs have to be cleaned and sorted into various grades. They are marked according to the grade . . . The result of these
- F processes is that the sorted results may be sold, whereas the original bulk could not be sold, because it would be illegal to sell the eggs until these various processes, including the process of grading which was done by machinery, had been carried out.”

- ATKINSON, J., said ([1947] K.B. at p. 963):

- G “ The article must not be regarded as an egg; what was being dealt with were crates of eggs.”

He went on to refer to *Hines v. Eastern Counties Farmers’ Co-operative Assn., Ltd.* (5) (the seed-cleaning case).

- H In the Irish egg case (*Valuation Comr. v. McAllister*) (14), on comparable though not identical facts what was done was held by LORD MACDERMOTT, C.J., and BLACK, L.J., to amount to adapting for sale, although looked on by LORD MACDERMOTT as a pure sorting case

- “ as the individual eggs leave the ratepayers’ premises in precisely the same condition in which they enter them.”

- I In the apple case, *East Kent Packers, Ltd. v. Buncombe* (15) ((1952), 45 R. & I.T. 151), the operation of sorting and grading apples was likewise held by the Lands Tribunal (whose decision was not appealed from) to amount to an adapting for sale.

On the other hand, in *James A. Jobling & Co., Ltd. v. Sunderland County Borough Assessment Committee* (16) ([1944] 1 All E.R. 500), where the primary purposes of a building occupied by glassware manufacturers were held to be

storage and distribution as distinct from adapting for sale, LORD GREENE, M.R., A said this ([1944] 1 All E.R. at p. 501):

"An argument was put forward that the process of storing, sorting, packing and dispatch of these finished products was a process of adapting for sale so as to be in itself a process which would be sufficient to bring the hereditaments within the meaning of factory or workshop as defined in the Factory Acts. In my opinion, that argument cannot bear examination for a moment. All that is done is to sort, store and pack and dispatch these articles. Nothing is done to the articles themselves, and it is a complete misuse of language to say that that amounts to adapting them for sale. There is no adaptation whatsoever. The article remains precisely the same article after it is sorted and packed as it was before. That point, therefore, I can put aside."

On the same side, there is *Davis Cohen & Sons, Ltd. v. Hall* (17) ([1952] 1 All E.R. 157). In that case the facts and conclusions of the court are thus stated in the headnote:

"The ratepayers occupied premises in which they stored twenty-five thousand cases of government surplus stores, the cases being there opened and their contents being identified and arranged, but no other work was done on them. Held: in the circumstances the premises were primarily occupied and used for the purpose of a distributive wholesale business and not for that of adapting an article for sale, and, therefore, they were not an industrial hereditament within the Rating and Valuation (Apportionment) Act, 1928, s. 3 (1)."

SIR RAYMOND EVERSHED, M.R. (at p. 159), gave the example of the purchase of 25,000 pairs of boots all mingled together, so that the operation had to be performed of sorting them out and finding the relative rights and lefts of each pair, so that eventually instead of a heap of unsorted boots, there was a number of pairs of boots, and said he would certainly be prepared to hold that it would not amount to an adaptation for sale within the meaning of the Factory and Workshop Act, 1901. As to the facts, we can quote this passage from the same judgment (*ibid.*, at p. 159):

"These cases were placed in the premises which are the subject of the present appeal, premises which were specially acquired for the purpose. There, with the assistance of eight unskilled men, the secrets of these boxes were one by one unfolded. The ratepayers then proceeded so to arrange the contents that, as from time to time occasion made convenient, they were able to dispatch for sale to their London premises the articles which they had acquired. They divided the goods into six general heads, including, for example, clothing, textile goods, and wireless sets, and each of those headings was itself subdivided according to the age and condition of the particular article—used, damaged, good as new, and so on. What I have so far described seems to me to be, whatever may be the result of it under the Act, no more than identification and arrangement."

Then, after referring to various special operations to which some of the goods were subjected, the Master of the Rolls said this (*ibid.*, at p. 160):

"I, therefore, proceed to consider my answer to the problem posed on the footing that at most the operations conducted on these premises were those of assembly to some extent and substantially of identification and arrangement. I have said enough to show that the operations so described

A were substantial. Therefore, the case, at the very least, may be said to come somewhere in the considerable region which lies between my illustration of boots and the decided cases of seeds and rags."

Later, the Master of the Rolls said this (*ibid.*, at p. 161):

B "In the present case, if it be necessary, I would be prepared to hold on the facts as found that there was here no adaptation for sale of the articles which emerged. I again exclude from consideration those minor activities relating to the anti-gas boots and so forth. Apart from them there was nothing which could, in my judgment, be fairly called any kind of industrial process with regard to these goods. I do not wish by that phrase to suggest a necessary test to be used in other cases, but it seems to me to be a brief way of emphasising, not inaccurately, the distinction that I draw between this case and *Hines v. Eastern Counties Farmers' Co-operative Assocn., Ltd.* (5) and *Kaye v. Burrows* (4). I think counsel for the valuation officer is entitled to say that in this case you start, not with an amorphous mass, but with an unarranged and unidentified aggregation of individual articles. At the end of the operations you have found what they were, identified them, and suitably arranged them, but you have done nothing more to them."

He expressed his conclusion thus ([1952] 1 All E.R. at p. 162):

E "I think that the tribunal, in deciding as it did, thought that what took place was but a stage in the wholesale business of the ratepayers, and that, therefore, the primary, principal, and substantial use of the premises was that of wholesale distribution, and that the tribunal inferentially negatived the argument that there was here an adaptation for sale. I think it was legitimate for the tribunal to find as a fact that there was in this particular case a primary use for wholesale distribution without necessarily finding that there was no adaptation for sale, and on that ground I should myself support the decision. In so far as it is necessary or appropriate in this case to express a view thereon, I think on the facts of this case that there was no adaptation for sale within the meaning of that phrase in s. 149 (1) (c) (iii) of the Factory and Workshop Act, 1901. For these reasons, therefore, I think that the ratepayers fail to show that the tribunal came to a wrong decision, and that the appeal should be dismissed."

G In this state of the authorities, counsel for the ratepayers submitted that the appeal should succeed on the ground that the greetings cards coming in from the printers in packages each containing from four hundred to one thousand identical cards and between them covering the entire range of greetings cards dealt with on the hereditament constitute a bulk comparable to (e.g.) the uncleaned seeds, unsorted rags, ungraded eggs, ungraded apples, and unboxed sweets, in the various decided cases. This bulk, he argued is unsaleable in the form in which it comes in because the wholesale purchasers, who are the only customers with whom the ratepayers deal, are not interested in single cards or quantities of identical cards, and will only buy cards arranged and packed in series. Therefore, in his submission, the process of collation which produces the saleable articles in the shape of the packets of cards arranged in series from the unsaleable bulk in the shape of the printers' packages each containing a quantity of one type only of the various cards to be included in the series, is an adaptation for sale. We find it impossible to accept this view. We do not think the packages of cards supplied by the printers are a bulk within the meaning attached to that expression in the cases. So far as we know, with the exception of the sweets case (*Fullers, Ltd. v. Squire*) (10), and leaving on one side obvious cases of adaptation such as the scrap-metal (*Pickin v. Langbaugh Assessment Committee*) (12)

and wool-sorting (*Weatherhead v. Bradford Assessment Committee*) (11) cases, every "bulk" case in which the ratepayer has succeeded has been concerned with a starting material in itself inherently unfit for sale in the state in which it comes to the hereditament. It may, e.g., be an "amorphous mass" like the rags, or a quantity of a saleable commodity adulterated by unwanted or deleterious material, like the uncleaned seeds (*Hines v. Eastern Counties Farmers' Co-operative Asscn., Ltd.*) (5), or a consignment of eggs (*Richardson v. Middlesbrough Borough Assessment Committee*) (13), (*Valuation Comr. v. McAllister*) (14), or apples (*East Kent Packers, Ltd. v. Buncombe*) (15), of all sizes and good, bad or indifferent in condition or quality. In such cases the process of sorting, selection, and rejection to which the bulk is subjected can reasonably be regarded as an adapting of the bulk for sale by producing from it as the article to be sold a smaller bulk of a different character in that it has not merely been taken out of the original bulk as it stood like the bulls-eyes in SCRUTTON, L.J.'s example, or produced by mere re-arrangement of the original bulk, but has been changed in character as compared with the original bulk by the elimination of undesirable or inappropriate constituents.

Here the greetings cards come in from the printers arranged in orderly fashion in the packages of identical cards covering between them the entire range of cards dealt in. There is no amorphous mass. The contents of each package are known. All the cards in every package are in themselves saleable articles, and all are intended for sale. It is not suggested that the packages contain any waste material or faulty or damaged cards from which the saleable cards must be sorted out. The practice of the trade demands that the cards should be packed for sale in series, and they are arranged in series by the operation of collation. This appears to us to be nothing more than the method of sale demanded by the trade, which calls, no doubt, for the re-arrangement of the cards in the various packages covering a given series, by taking one card from each package and arranging the cards so taken in the appropriate order. We cannot regard this as an adaptation for sale of the greetings cards. We do not think it can reasonably be said on the facts of this case that the article to be sold is a series of cards produced by an adaptation for sale of a different article in the shape of the packages of cards from each of which one member of the series is taken. We think the article to be sold in this case is a number of cards arranged in series and not a series of cards. If we are wrong, the result would be, as we think, to carry the "bulk" principle considerably further than has so far been done. For example, a dealer in table china might receive from manufacturers separate crates of cups, saucers, plates and teapots, and the demand from his wholesale customers might be for tea-sets each comprising a teapot, a dozen cups each with a saucer and a dozen plates. To comply with the demand the dealer would have to take from the manufacturers' crates the items required to make up a set and pack them together for dispatch to the customer. If the submission of counsel for the ratepayers in the present case were accepted, it would, so far as we can see, follow by parity of reasoning that in the imaginary case we have suggested the simple operation of arranging the china in sets would amount to an adapting of it for sale. We are not prepared to accept that view any more than the Master of the Rolls was prepared to accept as an adapting for sale his example of sorting boots into pairs in *Davis Cohen & Sons, Ltd. v. Hall* (17).

As to the sweets case, *Fullers, Ltd. v. Squire* (10), we have treated this as a "bulk" case though it actually antedated by some thirty years the enunciation of the "bulk" principle in 1931. It did not concern "de-rating," which had not then been invented; but came before the Divisional Court on an appeal by way of Case Stated from the decision of a magistrate to the effect that a breach

A of the Factory and Workshop Act, 1878, had been committed. The woman had undoubtedly been employed for grossly excessive hours, whether an offence had been committed or not, and the case was thus one in which the court might well not be astute enough to find that she was outside the protection of the Act of 1878. Nevertheless, the relevant provisions in that Act were substantially in the same terms as the relevant provisions in the Act of 1901, and the case is accordingly well in point. The operations performed by the woman in the process of boxing the sweets came to a great deal more than the simple operation of "collation" performed in the present case. She had to select the sweets, arrange them in layers in the boxes with ornamental papers between them, and then fasten the boxes with fancy ribbons tied in bows on their outside. This, as it seems to us, sufficed to justify the Divisional Court in holding that there was evidence on which the magistrate could come to the conclusion he did, that, as LORD ALVERSTONE, C.J., observed, being the only question which the court had to decide. As to that observation, we would say that in a case of this kind the question for the court on appeal by way of Case Stated is whether on the facts found by the tribunal in fact the tribunal could on the true construction of the relevant statutory provisions, or, in other words, as a matter of law, properly come to the conclusion at which it arrived.

We cannot see that the Lands Tribunal on the facts of the present case could not as a matter of law properly come to the conclusion that it did. Counsel for the ratepayers submitted that the President's decision here was vitiated by his view that in order to decide whether what is being done on the premises is adapting for sale he must follow the article in question into the hands of the consumer. This, said counsel, conflicts with the well-settled principle that what happens to the article on the hereditament is alone material, its subsequent history being wholly irrelevant. We do not think this criticism is sound. The President appears to us to be using the subsequent history of the article to test the true character of the process to which it is subjected on the hereditament. That is surely legitimate. The sorted bulk of the rags, the cleaned seeds, the graded eggs or apples go out into the world as articles of commerce impressed with a particular character attaching to them by virtue of the process to which they have been subjected on the hereditament. The collated cards go out into the world simply as boxes of cards arranged in series for convenience of disposal and not impressed with any special character by virtue of anything done to them on the hereditament. That seems to us to be a perfectly legitimate test.

In our view, the process here in question is not an adapting for sale, but what VISCOUNT DUNEDIN in *Sedgwick v. Watney, Combe, Reid & Co.* (1) ([1931] All E.R. Rep. at p. 250) called a mere prelude to distribution. The result in our opinion is that the hereditament here in question must be held to be primarily used for the purpose of "distributive wholesale business" and thus excluded from the definition of the expression "industrial hereditament" contained in s. 3 (1) of the Act of 1928 by the proviso to that sub-section. Accordingly we cannot find that the Lands Tribunal fell into any error of law in reaching the conclusion that it did, with which conclusion we find ourselves in complete agreement. We would therefore dismiss the appeal of Wilson Brothers, Ltd.

I Secondly, as to the Hudson's Bay Co. In this case the activity relied on as constituting an adapting for sale consists in the sorting, grading and matching of furs, and their arrangement in matched lots of skins of uniform grade for sale at the company's fur auctions. Of the consignments of skins received from trappers and breeders, a small proportion requires cleaning and is subjected to a mechanical process to that end, but the proportion so treated is insignificant in comparison to the total of skins handled and can (it is agreed) be ignored for the present purpose, as also can the special treatment accorded to musquash.

For the rest, the skins brought into the hereditament are clean, but in unmatched, A
unsorted and ungraded parcels, and if sold in that state (if saleable at all) would
command a very poor price, the demand being for matched and graded skins of
uniform quality. Each parcel is accompanied by an invoice stating the num- B
ber and types of skins it contains. On arriving at the hereditament, the
contents of each parcel are checked with the invoice and each skin is marked
so as to be identified as the property of the owner of that parcel and it remains
so identified throughout its subsequent history down to the time of sale. Having
been thus marked, the skins received are mixed together regardless of ownership
and subjected to a highly skilled process of sorting, grading and matching, and
ultimately made up into lots of matched and graded skins of uniform quality C
which will include skins belonging to several different trappers or breeders.
These lots are put up for sale at the ratepayers' periodical skin auctions, when
they are bid for by dealers at so much per skin, the owner of each skin included
in the lot receiving the appropriate price (less commission) for the skin or skins
contributed by him as identified by the mark placed on it or them on arrival
at the hereditament. It is not in dispute that this method of disposal realises D
a far better price than the owners could hope to realise by selling their skins
by themselves.

The facts are dealt with in considerable detail in the transcript of the evidence
of Mr. Frayling, the general manager of the ratepayers' fur sales organisation,
a copy of which is annexed to the Stated Case. We must not burden this judg- E
ment, already overlong, by repeating them in extenso. There is no doubt that
the operations of sorting, matching and grading demand very great skill and
experience. But it does not necessarily follow that these operations amount to
an adapting for sale.

If on the facts the articles to be sold could properly be regarded as a bulk of
sorted, matched and graded skins produced by these operations from an aggregate F
of unsorted, unmatched and ungraded skins, then there would be much to be
said for the view that there was here an adapting of the skins for sale on the
principle of the various "bulk" cases already quoted. But we cannot regard
this as a "bulk" case. We think that the article to be sold must on the facts
consist of each individual skin belonging to each intending vendor. Each parcel
delivered at the hereditament for sale comprises individual skins of the number G
and types particularised in the invoice, and each of those skins is marked as
the property of the intending vendor and thenceforth dealt with as such. The
auctioneer employed by the ratepayers when he sells each lot at so much per
skin must be taken as selling each individual skin comprised in it as agent for
and on behalf of the vendor to whom it belongs. We do not see how this can
be treated as a "bulk" case consistently with the system of sale in fact adopted. H
It is of the essence of the "bulk" principle that the components of the bulk
should lose their identity in the bulk, so that the bulk and not its individual
components can properly be regarded as the article to be sold. That is plainly
impossible here. The whole system of sale depends on the identity and owner-
ship of individual skins being preserved. The elaborate system of sorting,
matching and grading enables each individual skin to be sold to the best advan- I
tage as part of a uniform lot, but we cannot regard it as an adapting for sale.
The President's findings of fact were criticised by counsel for the ratepayers in
various respects. There is to our minds no substance in those criticisms. Be
that as it may, the facts on which we found ourselves are not in dispute, and
appear to us to be fatal to the ratepayers' claim. Accordingly, we think that
this appeal should also be dismissed.

Appeals dismissed.

A Solicitors: *Nicholson, Graham & Jones* (for the ratepayers, Wilson Brothers, Ltd.); *Linklaters & Paines* (for the ratepayers, Hudson's Bay Co.); *Solicitor of Inland Revenue* (for Shoreditch Metropolitan Borough Council and the valuation officers).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

B

RIVERSTONE MEAT CO., PTY., LTD. v. LANCASHIRE SHIPPING CO., LTD.

[QUEEN'S BENCH DIVISION (McNair, J.), July 15, 16, 17, 18, 21, 22, 23, 24, 31, 1958.]

C *Shipping—Seaworthiness—Due diligence to make ship seaworthy—Unseaworthiness caused by negligence of employee of competent independent contractor—Impossible to detect negligence—Whether due diligence exercised by shipowner—Australian Sea Carriage of Goods Act, 1924, art. III, r. 1, art. IV, r. 2 (a).*
Shipping—Soundings—Failure to take proper soundings—Whether shipowner liable for damage resulting from failure—Whether “neglect in management of ship”—Australian Sea Carriage of Goods Act, 1924, art. III, r. 1, art. IV, r. 2 (a).

D

Goods shipped under a bill of lading which was subject to the rules applied by the Australian Sea Carriage of Goods Act, 1924, were carried in a lower hold of the defendants' cargo ship in the summer of 1953 and sustained damage from sea water. The ship was classified in the highest class in Lloyd's Register for ships not built under their supervision. Early in 1953 the ship had passed her No. 2 special survey by Lloyd's Register surveyors and her annual loadline survey. The sea water that entered the hold on the voyage was forced through interstices below inspection covers. The most probable cause of the admission of the water was that a fitter employed by independent contractors, ship repairers of repute employed by the shipowners, had opened up inspection covers of storm valves for inspection on the loadline survey and had negligently failed to secure the nuts of the inspection covers evenly or sufficiently on replacing the covers. This defect rendered the ship unseaworthy, but the result of the fitter's negligence was not discoverable by Lloyd's surveyor or the shipowners' competent marine superintendent, who attended the survey on behalf of the shipowners, carrying out their survey duties in accordance with ordinary prudent practice. The presence of water in the hold was first ascertained when the ship was in dock after the end of the voyage. In an action by the cargo owners against the shipowners alleging (among other allegations) that the ship was unseaworthy by reason of the defective inspection covers and was unseaworthy in design, the shipowners contended that they had fulfilled the duties imposed on them by art. III, r. 1 (a)* of the Act of 1924, by exercising “due diligence to make the ship seaworthy”; and they contended that if, as the cargo owners alleged, no proper soundings had been taken, they, the shipowners, were protected by art. IV, r. 2 (a)* which exempted carriers from liability arising from “act, neglect, or default . . . in the management of the ship.” The court found that regular soundings had been taken throughout the voyage.

H

I

* These are the same, so far as relevant, as those contained in the schedule to the Carriage of Goods by Sea Act, 1924, which provides by art. III, r. 1:—

“The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to—(a) Make the ship seaworthy: . . .”
 and provides by art. IV, r. 2:—

“Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—(a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship: . . .”

Held: the shipowners had fulfilled their duty under art. III, r. 1, to exercise due diligence to make the ship seaworthy, and thus were not liable to the cargo owners, since—

(i) the shipowners were not liable for the negligence of the fitter employed by independent contractors in the circumstances of the present case, viz., where the shipowners had employed a competent superintendent in relation to the loadline survey who was not negligent in failing to detect the defect.

W. Angliss & Co. (Australia) Proprietary v. Peninsular & Oriental Steam Navigation Co. ([1927] 2 K.B. 456) followed.

Wilsons & Clyde Coal Co., Ltd. v. English ([1937] 3 All E.R. 628); *Northumbrian Shipping Co., Ltd. v. E. Timm & Son, Ltd.* ([1939] 2 All E.R. 648) and *Davie v. New Merton Board Mills, Ltd.* ([1958] 1 All E.R. 67) considered.

(ii) even if the ship had been unseaworthy in design (which the court found she was not), the shipowners would not have been required to go behind her classification certificate for the purpose of establishing due diligence on their part.

Waddle v. Wallsend Shipping Co., Ltd. ([1952] 2 Lloyd's Rep. 105) applied.

Per CURIAM: failure to take soundings [in a hold of a ship] came within the exceptions in art. IV, r. 2 (a), being a "neglect . . . in the management of the ship" (see p. 272, letter F, post).

International Packers (London), Ltd. v. Ocean S.S. Co., Ltd. ([1955] 2 Lloyd's Rep. 218) applied.

Smith & Sons Fellmongery Proprietary, Ltd. v. Peninsular & Oriental Steam Navigation Co. ([1938], 60 Lloyd's Rep. 419) doubted.

[As to the Carriage of Goods by Sea Act, 1924, Sch., art. III, r. 1 and art. IV, r. 2 (a), see 30 HALSBURY'S LAWS (2nd Edn.) 611, para. 771, 614, para. 772.

For the Carriage of Goods by Sea Act, 1924, Sch., art. III, r. 1 and art. IV, r. 2 (a), see 23 HALSBURY'S STATUTES (2nd Edn.) 887, 890.]

Cases referred to:

(1) *Dobell & Co. v. S.S. Rossmore Co.*, [1895] 2 Q.B. 408; 64 L.J.Q.B. 777; 73 L.T. 74; 41 Digest 429, 2697.

(2) *Angliss (W.) & Co. (Australia) Proprietary v. Peninsular & Oriental Steam Navigation Co.*, [1927] 2 K.B. 456; 96 L.J.K.B. 1084; 137 L.T. 727; 41 Digest 474, 3054.

(3) *Smith & Sons Fellmongery Proprietary, Ltd. v. Peninsular & Oriental Steam Navigation Co.*, (1938), 60 Lloyd's Rep. 419.

(4) *Paterson Steamships, Ltd. v. Canadian Co-operative Wheat Producers, Ltd.*, [1934] All E.R. Rep. 480; [1934] A.C. 538; 103 L.J.P.C. 166; 151 L.T. 549; Digest Supp.

(5) *Wilsons & Clyde Coal Co., Ltd. v. English*, [1937] 3 All E.R. 628; [1938] A.C. 57; 106 L.J.P.C. 117; 157 L.T. 406; Digest Supp.

(6) *Fanton v. Denville*, [1932] All E.R. Rep. 360; [1932] 2 K.B. 309; 101 L.J.K.B. 641; 147 L.T. 243; Digest Supp.

(7) *Northumbrian Shipping Co., Ltd. v. Timm (E.) & Son, Ltd.*, [1939] 2 All E.R. 648; [1939] A.C. 397; 108 L.J.K.B. 503; 160 L.T. 573; Digest Supp.

(8) *Waddle v. Wallsend Shipping Co., Ltd.*, [1952] 2 Lloyd's Rep. 105.

(9) *International Packers (London), Ltd. v. Ocean S.S. Co., Ltd.*, [1955] 2 Lloyd's Rep. 218.

(10) *Davie v. New Merton Board Mills, Ltd.*, [1958] 1 All E.R. 67.

(11) *Bain v. Fife Coal Co.*, 1935 S.C. 681; Digest Supp.

- A (12) *Gosse Millard v. Canadian Government Merchant Marine, Ltd.*, [1928] 1 K.B. 717; sub nom. *Gosse Millard v. Canadian Government Merchant Marine, Ltd., American Canning Co. v. Same*, 97 L.J.K.B. 193; 138 L.T. 421; *reversd.* H.L., [1929] A.C. 223; 98 L.J.K.B. 181; 140 L.T. 202; 41 Digest 434, 2721.
- (13) *The Glenochil*, [1896] P. 10; 65 L.J.P. 1; 73 L.T. 416; 41 Digest 426, 2683.
- B (14) *The Silvia*, (1898), 171 U.S. Rep. 462; *affg.* 64 Fed. Rep. 607; 68 Fed. Rep. 230.
- (15) *The Mexican Prince*, (1897), 82 Fed. Rep. 484; *affd.* 91 Fed. Rep. 1003.
- (16) *The British King*, (1898), 89 Fed. Rep. 872; *affd.* 92 Fed. Rep. 1018.
- (17) *The Sandfield*, (1897), 77 Fed. Rep. 371; 92 Fed. Rep. 663.
- C (18) *The Ontario*, (1900), 106 Fed. Rep. 324.
- (19) *The Merida*, (1901), 107 Fed. Rep. 146.

Action.

In this action Riverstone Meat Co., Pty., Ltd., the plaintiffs (referred to hereinafter as "the cargo owners"), claimed damages against the Lancashire Shipping Co., Ltd., the defendants (referred to hereinafter as "the shipowners"), in respect of the carriage of goods on board the shipowners' vessel, the Muncaster Castle, which were found to be damaged when they were discharged from the vessel. On May 7, 1953, 150 cases of tinned ox tongues were shipped on board the Muncaster Castle at Sydney for carriage to London under a bill of lading to which the cargo owners were parties either as original shippers or as indorsees of the bill. The bill of lading was subject to the rules set out in the Australian Sea Carriage of Goods Act, 1924. The goods were stowed in the after end of No. 5 lower hold of the vessel. When they were discharged at the Royal Albert Docks, London, in July, 1953, they were found to be damaged by sea water which had entered No. 5 hold on the voyage because of defective storm valves on the port and starboard sides of the hold. The water was not discovered in the hold until four days after the vessel arrived in London. In these circumstances, the cargo owners alleged that the goods were damaged as a result of the unseaworthiness of the vessel in that, (1) the inspection covers over the storm valves in the port and starboard scupper pipes in the hold were defective so that water leaked in, the defect being either (a) that the nuts securing the inspection covers were insufficiently tightened up, or (b) that the rubber jointings of the covers were perished; (2) there were no drainage arrangements in the forward end of No. 5 hold, and there were no arrangements for taking soundings to discover if water was present in the forward end of the hold; (3) the cargo was so closely stowed in the hold that it prevented water draining from the drainage well in the after end of the hold. The shipowners contended that as carriers they had exercised due diligence to make the vessel seaworthy, in accordance with their obligation under art. III, r. 1 of the rules applied by the Australian Sea Carriage of Goods Act, 1924, and that if, contrary to their contention, no proper soundings were taken, they were protected from that failure by the exception in art. IV, r. 2 (a) of the rules which provides:

"Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—(a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier . . . in the management of the ship."

The following facts were found by McNAIR, J. The Muncaster Castle was converted from an aircraft carrier to a cargo vessel in 1948 and conformed to a C.3 type cargo vessel; she was classified with the British Corporation which was united with Lloyd's Register in 1949. The vessel was well maintained by the shipowners who acquired her in 1949. No. 5 hold, the aftermost of the vessel's five cargo holds, was eighty-two feet long, narrowing from fifty-two feet at her forward end to eight feet at the after end. At the base of the web and main

frames on either side of the hold and behind the vertical spar ceilings there were small drainage holes which permitted water entering into the forward end of the hold to find its way into the wings and drain from the after end. At the starboard side of the after end, there was a sounding pipe leading to the bare hold ceiling which was divided from the drain well situated in the after end by a solid longitudinal bulkhead extending upwards to deck level. The drain well at the after end, which could be drained into a tunnel shaft below by a drainage cock, was the only means of clearing water from the hold. Two scupper pipes from the weather deck led down into the foremost frames on both port and starboard sides of the hold whereby water from the weather deck found its way, by means of a clack type storm valve, through the shell plating of the vessel and out into the sea; this outlet to the sea led from an inspection chamber which was closed at the top by a horizontal inspection cover, the cover being bolted to the top of the chamber by four nuts affixed to studs in the chamber. Between the inspection cover and the top of the chamber there was a rubber jointing or gasket. If the inspection cover was not properly secured, or the rubber jointing was defective, sea water might enter the hold. In February, 1953, before her outward voyage to Australia, the vessel underwent, at Glasgow, a No. 2 special survey by Lloyd's Register surveyors and was reported to be in good condition and eligible to remain in her existing class in the Register book which was the highest class for vessels not built under Lloyd's supervision. At the same time, the vessel was passed through her annual loadline survey, and for this purpose, the shipowners insisted that all outlets to the sea should be opened up; accordingly, a Mr. Atkinson, an experienced and competent marine superintendent employed by the managers of the vessel, who was attending to the vessel for the purposes of the survey on behalf of the shipowners, instructed Messrs. Alex Stephens, a ship repairing firm of the highest repute, to open up all the storm valves in the vessel, including the two situated in the forward end of No. 5 hold, for inspection by Lloyd's surveyors; this involved opening up the inspection covers over the valves. After the surveyors had carried out their inspection, it was necessary to close each inspection cover by placing a new rubber jointing between the cover and the top of the inspection chamber, placing the cover over the studs in the top of the chamber and tightening up the nuts; the work of tightening up the nuts was, according to ordinary and prudent practice, done by the ship repairer's fitter and was not, as a matter of practice, supervised by Lloyd's surveyors or the shipowners' marine superintendent. Once the nuts were tightened up, no visual inspection would reveal any unevenness in the position of the inspection cover or that the nuts were insufficiently tightened up. After the storm valves were closed up a hose test was carried out by inserting a hose in the scupper pipes at weather deck level, but this test would not show whether there was a leak through any of the inspection covers. The vessel left Glasgow for Australia on Mar. 15, 1953; and on the outward voyage, there was no damage done by sea water to the cargo in No. 5 hold. After the cargo in the after end of No. 5 hold was discharged at Sydney, the hold was inspected by the chief officer but no leakage of sea water into it was detected. The cargo owners' cargo was then loaded in the after end of No. 5 hold. At Brisbane, where the cargo which was stowed in the forward end of No. 5 hold was discharged, the hold was again examined, but no sea water was found. These examinations were properly carried out and, in fact, no sea water had entered the hold during the outward voyage. On the homeward voyage there was some heavy, but not abnormal, weather. After discharging cargo at Hull, the vessel docked at the Royal Albert Docks, London, on July 13, 1953, and cargo was discharged from No. 5 hold from July 14 to July 16 without sea water being found there. However, when the p.m. soundings were taken on July 16, when there was still cargo in the hold, one foot, three inches of sea water was found in the hold and subsequent

- A examination showed that the water had entered through gaps which had developed between the inspection cover and the top of the inspection chamber. The court (McNAIR, J.) found that the most probable cause of the admission of sea water was that the ship repairer's fitter at Glasgow had negligently failed to tighten the nuts on the inspection cover evenly or sufficiently so that the working of the ship on the outward voyage had loosened the nuts so as to allow the
- B heavy seas on the homeward voyage to enter the hold. His LORDSHIP was not satisfied that the rubber jointings of the inspection cover were defective. On the evidence before him, he further found that regular soundings of No. 5 hold were taken throughout the voyage, and also, that the hold was reasonably fit to carry cargo and had no peculiarity which required departure from the normal practice of having a drain well and a sounding pipe only at the after end of the
- C hold.

Ashton Roskill, Q.C., and J. F. Willmer for the cargo owners, the plaintiffs.

M. R. E. Kerr for the shipowners, the defendants.

Cur. adv. vult.

- July 31. McNAIR, J., read the following judgment: This case raises
- D interesting questions as to the proper construction and effect of art. III, r. 1 and art. IV, r. 2 (a) of the rules scheduled to the Australian Sea Carriage of Goods Act, 1924, which are in identical terms with the corresponding provisions in the British Carriage of Goods by Sea Act, 1924.

[His LORDSHIP, having referred to the contentions of the parties and having stated the facts, continued:]

- E I now deal with the first question of law, namely, whether on proof that unseaworthiness has resulted from the negligence of a workman employed by a competent ship repairer engaged by the shipowner, the result of whose negligence would not be discoverable by Lloyd's surveyors or the owners' marine superintendent carrying out their duties in accordance with the ordinary prudent practice of such persons, the shipowner should properly be held liable for failure to
- F exercise due diligence to make the ship seaworthy.

- Since the decision of the Court of Appeal in *Dobell & Co. v. S.S. Rossmore Co.* (1) ([1895] 2 Q.B. 408)—a decision on the effect of s. 3 of the Harter Act* under which the shipowner is given certain statutory protection conditional on the exercise by him of due diligence to make the ship seaworthy—it has been
- G accepted that due diligence must be exercised "by the owner himself or the agents whom he employs to see to the seaworthiness of the ship." The negligence in issue in that case was the negligence of the ship's carpenter in the direct employment of the shipowner and no question of the negligence of a servant of an independent contractor arose or was discussed.

- In *W. Angliss & Co. (Australia) Proprietary v. Peninsular & Oriental Steam Navigation Co.* (2) ([1927] 2 K.B. 456), one of the earliest decisions under the 1924 legislation incorporating the Hague Rules, WRIGHT, J., took occasion to examine exhaustively the content of the obligation to exercise due diligence. In that case the plaintiffs' goods were damaged by oil fuel or the fumes therefrom leaking through into the cargo hold from an oil fuel bunker owing to a defective deck bar. The findings of fact are summarised (*ibid.*, at p. 458):

- I " (1) the design of the bar and of its fitting was inadequate and defective, and there should have been a cofferdam, but these defects of design involved no failure of due diligence on the part of any person concerned, having regard to the fact that carriage of oil fuel in such circumstances had not then been the subject of sufficient experience and having regard to the existing current standard of knowledge in such matters; (2) there was some bad workmanship both in riveting and in fitting the bar to the bulkhead which was entirely

* The Harter Act, 1893, of the United States.

the fault of the individual workmen employed by the builders and could not have been detected by any reasonable care on the part of the defendants' inspector, or by Lloyd's inspector, or the Board of Trade inspector, or by the builders' foremen; (3) the damage to the plaintiffs' cargo was due to the defects of design, although it may have been contributed to by the bad workmanship."

On these findings the learned judge stated the legal position to be as follows ([1927] 2 K.B. at p. 460):

"The obligation of the carrier to exercise due diligence to make the ship fit is clearly not limited to his personal diligence. The carrier may be a company and, in any case, in the complication of modern affairs and by reason of the widely scattered situation of seaports, he must act by agents or servants, which is the phrase employed in art. IV (2) (q)*. The question is: How wide is the category of agents or servants with reference to the obligation now being considered. It is contended by the plaintiffs that, as the primary obligation on the carrier is to provide a seaworthy ship, the carrier cannot delegate any part of that obligation so as to relieve him of his personal liability, and he must accordingly be accountable for lack of due diligence on the part of the shipbuilders and their workmen, who are to be deemed to be his agents, to make the ship seaworthy and fit, and that, therefore, the defendants must be held liable for the bad workmanship of which I have found the shipbuilder's men guilty and which I have not excluded as a contributing cause of the actual damage. I do not think that this contention is sound."

Then the learned judge deals with the history of the Carriage of Goods by Sea Acts and their development and continues (*ibid.*, at p. 461):

"Under the old rule the only relevant question was whether the ship was seaworthy or unseaworthy. That rule was no doubt well adapted to more simple days when ships were not very complicated wooden structures of a few hundred tons, but in modern times, when ships are complicated steel structures full of complex machinery, the old unqualified rule imposed too serious an obligation on carriers by sea, and I think that the new Acts have intended to emphasise the specialisation which has developed in modern times and to emphasise the distinction between carrier and shipbuilder and limit the carrier's obligation to due diligence in his capacity as carrier. He is to be liable for all such duties as appertain to a prudent and careful carrier acting as such by the servants and agents in his employment. If he has a new vessel built he will be liable if he fails to engage builders of repute and to adopt all reasonable precautions. He may be held bound to require, for instance, the builders to satisfy one of the well known classification societies, such as Lloyd's, or to engage skilled naval architects to advise him and skilled inspectors to supervise the work. In the same way, if he buys a ship he may be required to show that he has taken appropriate steps to satisfy himself by appropriate surveys and inspections that the ship is fit for the service in which he puts her. But I do not think in any case that the carrier can be held guilty of want of due diligence simply because the builders' employees have put in some bad work which, though concealed, renders the vessel unfit."

"In the present case the defendants employed an inspector to supervise the work. I have held that that inspector used due diligence. It may well be that, if he had negligently passed bad work which he saw, or even, perhaps, which he ought to have seen, the carrier would be liable for want of due diligence on the part of one to whom he had delegated the task of

* *Viz.*, art. IV (2) (q) of the schedule to the Carriage of Goods by Sea Act, 1924.

- A inspecting the work, although such supervision, it may be, cannot be other than general or go to every detail of the workmanship. Similarly, the carrier might perhaps be held liable if the naval architect whom he employed to supervise the design, applying current standards, failed to detect a definite error in design, although I do not think that he would be so liable for an error on the part of one of the classification societies, such as Lloyd's,
- B which occupy a public and quasi-judicial position. He might also be liable if, either personally or by his scientific advisers, he chose a special form of construction which involved, according to current standards, a known risk—for example, if he chose to dispense with a cofferdam so as to increase his cargo space although the best opinion thought a cofferdam necessary. Again, the need of repairing a ship may cast on the carrier a special duty to see, as far as reasonably possible, by special advisers for whom he is
- C personally responsible, that the repairs adequately make good the defects."

- I have read that passage in full because in my opinion this judgment has since that date been accepted by the profession as stating the legal position authoritatively and accurately, and I have no doubt that the innumerable disputes between shippers and cargo owners have been settled on the basis of this
- D judgment. The passage in the judgment dealing with the shipowner's responsibility in the case of repairs effected by competent ship repairers was adopted and applied by SINGLETON, J., in *Smith & Sons Fellmongery Proprietary, Ltd. v. Peninsular & Oriental Steam Navigation Co.* (3) ([1938], 60 Lloyd's Rep. 419 at p. 423). The only other reported case in which the decision in *W. Angliss & Co. (Australia) Proprietary v. P. & O. Steam Navigation Co.* (2) has been affirmed, so far as I know, until recent years is the decision in *Paterson Steamships, Ltd. v. Canadian Co-operative Wheat Producers, Ltd.* (4) ([1934] All E.R. Rep. 480) in the Privy Council, where LORD WRIGHT (*ibid.*, at p. 486) says:
- E

- "What is meant in the British Carriage of Goods by Sea Act, 1924, by due diligence to make the ship seaworthy was discussed in *W. Angliss & Co. (Australia) Proprietary v. P. & O. Steam Navigation Co.* (2); it is not limited to personal diligence on the part of the owner."
- F

I do not read LORD WRIGHT's observations there as indicating that he was in any way resiling from the view which he had expressed as a judge of first instance in 1927.

- It is argued, however, by the cargo owners that a different view was expressed
- G by LORD WRIGHT in *Wilsons & Clyde Coal Co., Ltd. v. English* (5) ([1937] 3 All E.R. 628 at p. 641). The point for decision in that case was whether the appellants as mine owners, being under a common law duty to exercise reasonable care in the provision of a safe system of work, were to be held to have discharged that duty by the appointment of a competent manager under s. 2 (4) of the Coal Mines Act, 1911, the facts arising at a time when the doctrine of
- H common employment was still applicable. The Court of Appeal in *Fanton v. Denville* (6) ([1932] All E.R. Rep. 360) (a case dealing with the parallel duty as to the provision of plant) had held that the employer is only liable if personal negligence is proved and that if the failure to supply or maintain the plant or machinery in a safe condition is due to the negligence of a manager to whom the duty has been entrusted by the employer, the employer is not responsible
- I unless it can be shown he failed to use reasonable care to select a competent manager or that he has in some way been guilty of personal negligence in connexion with the instalment or maintenance of the machinery or plant or in permitting the continuance of its use after he became aware of its unsafe condition. LORD WRIGHT, after discussing that case and the earlier decisions of the House, concludes as follows ([1937] 3 All E.R. at p. 641):

"But in truth the employer's obligation, as it has been defined by this House, is personal to the employer, and one to be performed by the employer

per se or per alios. If I may take an analogy or instance of a similar personal obligation, I note that the Carriage of Goods by Sea Act, 1924, requires a shipowner to exercise due diligence, or to take reasonable care, to provide a seaworthy ship. The shipowner is almost certainly not an expert naval architect, engineer, or stevedore. So far as I know, it has never been claimed that this obligation is fulfilled by the shipowner taking reasonable care to appoint a competent expert: the shipowner is absolutely held to the fulfilment of the obligation. It is the obligation which is personal to him, and not the performance."

To the same effect are LORD WRIGHT's observations in *Northumbrian Shipping Co., Ltd. v. E. Timm & Son, Ltd.* (7) ([1939] 2 All E.R. 648 at p. 651):

"The obligation to make a ship seaworthy is personal to the owners, whether or not they entrust the performance of that obligation to experts, servants or agents. They cannot say that there was a miscalculation merely due to the negligence of their servants."

In neither of these cases does it appear that *W. Angliss & Co. (Australia) Proprietary v. P. & O. Steam Navigation Co.* (2) was cited in argument; but I cannot believe that LORD WRIGHT can have forgotten his decision in this case or can have intended to throw any doubt on its correctness.

In *Waddle v. Wallsend Shipping Co., Ltd.* (8) ([1952] 2 Lloyd's Rep. 105) DEVLIN, J., following WRIGHT, J., in *W. Angliss & Co. (Australia) Proprietary v. P. & O. Steam Navigation Co.* (2) after being referred to *Wilsons & Clyde Coal Co., Ltd. v. English* (5), held (*ibid.*, at p. 130), on a claim by the widow of a deceased member of the crew of the *Hopstar*, that the shipowners were not liable for a defect in design whether it was due to the builders or Lloyd's Register surveyors.

I was also referred to a decision of my own in *International Packers (London), Ltd. v. Ocean S.S. Co., Ltd.* (9) ([1955] 2 Lloyd's Rep. 218) in which I am reported to have said (*ibid.*, at p. 236) as regards the obligation to exercise due diligence that the shipowner

"... cannot escape on proof that he employed a competent independent contractor who was in fact negligent."

I think that the reference to *W. Angliss & Co. (Australia) Proprietary v. P. & O. Steam Navigation Co.* (2) which follows makes it clear that what I had in mind was the appointment of a competent independent surveyor. Though I have not preserved the notes of my judgment, I have read through my notes of the argument in that case, and it is clear that no submissions were made to me as to the position of an independent contractor or his servants. The use of that term by me in the judgment was either a slip or a mistake in reporting. I am quite clear that I had not in mind the question of the negligence of the servant of an independent contractor such as a ship repairer or shipbuilder.

Accordingly, on the authorities to which I have referred I should have had little doubt about holding on the facts of this case that the shipowners should not be held liable for the casual negligence of the fitter employed by competent independent contractors such as Alex Stephens, when, as I have found, their own competent surveyor, Mr. Atkinson, was not negligent in failing to detect this bad workmanship by the fitter.

However, LORD WRIGHT's observations in *Wilsons & Clyde Coal Co., Ltd. v. English* (5) have recently been considered by the Court of Appeal in *Davie v. New Merton Board Mills, Ltd.* (10) ([1958] 1 All E.R. 67), apparently without citation of his decision in *W. Angliss & Co. (Australia) Proprietary v. P. & O. Steam Navigation Co.* (2). In *Davie v. New Merton Board Mills, Ltd.* (10) the question at issue was whether the employers were liable to the workman for

A injury sustained in the use of a tool purchased by the employer from competent suppliers who in turn purchased the tool from a competent manufacturer who in fact was negligent on the particular occasion in the manufacture of the tool in question. JENKINS, L.J., in a dissenting judgment in favour of the workman stated the legal proposition in terms wide enough to be fatal to the shipowners in the present case. After referring to LORD WRIGHT's speech in *Wilsons & Clyde Coal Co., Ltd. v. English* (5) ([1937] 3 All E.R. at p. 641), he says this ([1958] 1 All E.R. at p. 78):

C "If the law was, as it might quite reasonably be, that an employer discharged his duty of taking reasonable care to provide sound tools by having them made by a reputable manufacturer or buying them ready made from reputable suppliers, the employers here could no doubt repel the charge of negligence now brought against them by showing that they bought the drift which turned out defective from reputable suppliers, and that the defect was not one which they could have discovered by reasonable inspection. But the law as it is does not, as I understand it, accept reliance on the care and skill of others as a performance of the duty. Therefore (to apply D LORD WRIGHT's language), the employers did not, in buying the drift from Baldwin & Co., Ltd., perform the duty per se; nor did they perform it per alios, since the manufacturers unfortunately failed to take reasonable care in the making of the drift."

E PARKER, L.J. ([1958] 1 All E.R. at p. 82), in referring to the principle stated in *Bain v. Fife Coal Co.* (11) (1935 S.C. 681), as approved in *Wilsons & Clyde Coal Co., Ltd. v. English* (5), says:

F "... it is I think clear that this principle holds good whether the person employed by the master is a servant, a full-time agent or an independent contractor. It is true that in *Wilsons & Clyde Coal Co.* case (5) ([1937] 3 All E.R. 628) the person under consideration was a manager employed by the owner of a mine, but all that was said there is equally applicable to the case of an independent contractor. Indeed LORD WRIGHT gave as an illustration (ibid., at p. 641) the case of a shipowner who employed an expert naval architect, engineer or stevedore to make his ship seaworthy—persons who in general would be independent contractors."

G But PARKER, L.J. ([1958] 1 All E.R. at p. 83), states the proposition on the basis of which he decided in favour of the employer in the following terms:

H "... it seems to me that the workman can only hold the employers liable if the true duty of a master is not merely to take reasonable care to provide a reasonably safe tool, but to provide a tool which has been manufactured with reasonable skill and care even when the manufacturer is in no contractual relationship with the master. Unless constrained to do so by authority I would be loath to hold that there was any such duty. Subject only to a defect latent to the manufacturer, and ordinarily this will not arise by reason of his expert knowledge, such a duty would amount to a warranty that the tool was safe."

I PEARCE, L.J. (ibid., at p. 89), in referring to LORD WRIGHT's speech in *Wilsons & Clyde Coal Co., Ltd. v. English* (5), says:

"Again it is noticeable that LORD WRIGHT in the passage which I have read [[1937] 3 All E.R. at p. 641] refers to the naval architect, the engineer, the stevedores, as people for whose neglect the shipowner will find himself vicariously liable. He does not refer to the shipbuilder. It seems to me unlikely that he was intending to express a principle by which every subsequent purchaser of the ship will be liable to his employee for some undiscoverable defect due to the original negligence of the shipbuilder. By undiscoverable defect I mean a defect that, though patent to the shipbuilder

during the construction, was not discoverable by subsequent purchasers, using reasonable care."

I have considered these judgments with anxious care, but I have come to the conclusion that they do not compel me to hold that the decision of WRIGHT, J., in *W. Angliss & Co. (Australia) Proprietary v. P. & O. Steam Navigation Co.* (2) ([1927] 2 K.B. 456) has been impliedly overruled. On the contrary, I think that the passage from PARKER, L.J.'s judgment, which I have cited, reinforces the submission made to me on behalf of the shipowners in the present case that acceptance of the construction sought to be put on art. III, r. 1, by the cargo owners would be in effect to substitute for the new qualified obligation as to seaworthiness, the old absolute warranty of seaworthiness, except in rare cases of the true latent defect in the sense of the defect not discoverable by care on the part of anyone. It would in my view be unfortunate if the development of the common law as to the employer's duty to his workman, which resulted in part at least from the natural desire to avoid the harsh results of the doctrine of common employment before its repeal, led almost accidentally to an alteration in the content of the obligation of the shipowner towards the cargo owner, which had, as I believe, been authoritatively defined over thirty years ago.

I, accordingly, hold that the shipowners have discharged the burden of proving that they exercised due diligence so far as concerns the inspection cover.

I now turn to the second allegation of unseaworthiness, namely, unseaworthiness by the design of the drainage and sounding arrangements in No. 5 hold. I have already stated earlier my acceptance of the view that there was no such peculiarity in the hold in question as to require departure from the normal practice of fitting drainage wells and sounding pipes in the after part of the hold. The vessel with the hold in the present condition has remained classified by the classification society since she became a cargo vessel on conversion in 1948, having passed through her initial and periodical surveys. According to the evidence of the ship's officers, which I accept, there was no previous record of cargo damage in this hold. I hold that the ship was not unseaworthy in design as alleged, and, further, that if, contrary to my finding, she was unseaworthy in that respect, I find that this was not due to any want of due diligence on the part of the shipowners. I accept and apply the observation of DEVLIN, J., in *Waddle v. Wallsend Shipping Co., Ltd.* (8) ([1952] 2 Lloyd's Rep. 105), that to require a shipowner to go behind the classification society's certificate would involve a retrogression beyond the point to which a reasonable shipowner can be expected to go.

I can also dispose shortly of the third allegation of unseaworthiness based on close stowage. This contention, like the allegation last considered, depends wholly on the alleged peculiarity of the hold in question. This I have negatived. I would add that there was no evidence, or no evidence acceptable to me, that the stowage was in any way improper. It was admittedly the normal stowage habitually employed at Australian ports for a general cargo such as the cargo in question. I accordingly negative unseaworthiness on this ground.

The conclusion which I have reached, that in fact the soundings were regularly taken in No. 5 hold, makes it unnecessary that I should express a final view on the second main question of law, namely, whether failure to take soundings is covered by the exception in art. IV, r. 2 (a) of

"act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship."

But as it was indicated to me that this case may be considered by another court, and in view of the careful and exhaustive arguments which were addressed to me on this point, it is convenient that I should deal with it.

I have recently had occasion in *International Packers (London), Ltd. v. Ocean S.S. Co., Ltd.* (9) ([1955] 2 Lloyd's Rep. 218 at p. 234), to review the relevant English authorities and certain American authorities on this question and no

A useful purpose would be served in setting out my conclusions again in this judgment, especially as in the argument before me in this case it was not suggested, as I understand it, that my appreciation of the authorities was erroneous. In *International Packers (London), Ltd. v. Ocean S.S. Co., Ltd.* (9), I came to the conclusion that the failure on the part of the ship's officers to fit locking bars over one of the hatches on the exposed weather deck at a time when severe weather was to be anticipated, fell within the exception notwithstanding that the amount of water which in fact entered did not endanger the ship as such. I quote (*ibid.*, at p. 235): "This failure resulted in the failure of one of the ship's main defences against the entry of sea water."

Broadly, the point may be put as follows:—A ship at sea only keeps afloat by securing that sea water is not in the ship. This process involves (a) preventing the admission of sea water, for example, by having effective hatches and by properly securing the valves at the outlets at or near the sea level; (b) the taking of proper soundings to detect the presence of sea water; soundings being required whether the ship is in ballast or carrying cargo and being required not only for cargo holds but also for any other compartments in which sea water may enter; and (c) pumping sea water out when it has been detected as having entered or, it may be, pumping periodically. Each of these operations, it is argued, is required for the ship and their neglect is, to use the language of GREER, L.J., in *Gosse Millard v. Canadian Government Merchant Marine, Ltd.* (12) ([1928] 1 K.B. 717 at p. 749) (which was approved in the House of Lords) "neglect to take reasonable care of the ship, or some part of it, as distinct from the cargo", or, to use the language of SIR FRANCIS JEUNE, P., in *The Glenochil* (13) ([1896] P. 10 at p. 16): "... want of care of vessel indirectly affecting the cargo". Further, as regards soundings, it is said that the quality of the act, namely, whether it is neglect of the vessel or neglect of the cargo, cannot be determined by the extent of the water which would have been found if the soundings had been taken.

I was usefully referred to a number of American decisions on this point arising under the Harter Act. The leading case in the U.S.A. is apparently *The Silvia* (14) ((1898), 171 U.S. Rep. 462), in which the Supreme Court, affirming BROWN, J. (64 Fed. Rep. 607) and the New York Circuit Court of Appeals (68 Fed. Rep. 230), held, following *The Glenochil* (13), that the failure of the ship's officers to fix iron covers inside the glass portholes, whereby in rough weather sea water entered the ship, was covered by the exception in question. GRAY, J., in delivering the judgment of the court, said (171 U.S. Rep. at p. 466) that the words in question

"include, at the least, the control, during the voyage, of everything with which the vessel is equipped for the purpose of protecting her and her cargo against the inroad of the seas; and if there was any neglect in not closing the iron covers of the ports, it was a fault or error in the navigation or in the management of the ship. This view accords with the result of the English decisions upon the meaning of these words."

In passing I emphasise the words "during the voyage" and "for the protection of her and her cargo against the inroad of the seas" as distinguishing this judgment from the judgment of SCRUTTON, L.J., which was disapproved in the House of Lords in *Gosse Millard v. Canadian Government Merchant Marine, Ltd.* (12). In *The Mexican Prince* (15) ((1897), 82 Fed. Rep. 484), BROWN, J. (who was also the trial judge in *The Silvia* (14) and, indeed, in most of the cases to which I was referred) held that failure to test a valve leading to a cargo hold before pumping out water from a neighbouring hold was within the exception as being a failure to use a means of safety provided by the owners. This decision was affirmed by the Circuit Court of Appeals (91 Fed. Rep. 1003), without a reasoned judgment, after the decision of the Supreme Court in *The Silvia* (14).

Again in *The British King* (16) ((1898), 89 Fed. Rep. 872), the same trial judge held that failure to take soundings and to apply the pumps was covered by the exception. This decision was also affirmed by the Circuit Court of Appeals (92 Fed. Rep. 1018), again without a reasoned judgment, after the decision of the Supreme Court in *The Silvia* (14). See also *The Sandfield* (17) ((1897), 77 Fed. Rep. 371; 92 Fed. Rep. 663) (failure to open sluice gate designed for emptying bilges). In *The Ontario* (18) ((1900), 106 Fed. Rep. 324), BROWN, J., again held, following *The British King* (16) that failure to keep pumps going to deal with a known accumulation of water was also within the exception, and, finally, in *The Merida* (19) ((1901), 107 Fed. Rep. 146), a Circuit Court of Appeals held that failure to take soundings and to use pumps for the removal of the water was within the exception.

The only English case to which I have been referred in which the failure to use pumps has been considered is the case of *Smith & Sons Fellmongery Proprietary, Ltd. v. Peninsular & Oriental Steam Navigation Co.* (3) ((1938), 60 Lloyd's Rep. 419), in which SINGLETON, J., having found that the shipowners had failed to exercise due diligence to make the ship seaworthy and were accordingly liable, also held that they were in breach of their obligation under art. IV, r. 2 (a) in that the presence of sea water having been found, the officers failed to use the pumps to clear the water, and for that failure the shipowners were not protected by the exception. This decision, if sound, leads to the odd result that if the failure to take soundings is, as the United States authorities suggest, an act, neglect or default in the management of the ship and, accordingly, the ship would have been protected if no soundings had been taken, yet if soundings are taken and disclose the presence of sea water, the ship is not protected if proper steps are not taken to remove the water found. It is not necessary for me to express any opinion as to the correctness of SINGLETON, J.'s decision on this point, which may well be justified on the particular facts of that case. I can summarise my opinion as follows: If it had been necessary for me to express a concluded judgment on the question whether the failure to take soundings was within the exception, I should on the authorities, both English and American, without doubt have held that it was. If, as I believe to be the case, the failure to secure the hatches on an exposed weather deck in rough weather, or when rough weather is to be anticipated, resulting in the absence of one of the main defences of the ship against the inroad of sea water, is within the exception, it would seem to me, as at present advised, logically and inevitably to follow that the failure to take soundings, which may result in dangerous quantities of sea water not being discovered, is also within the exception.

There must, accordingly, be judgment for the shipowners.

Judgment for the shipowners, the defendants.

Solicitors: *Clyde & Co.* (for the cargo owners, the plaintiffs); *Botterell & Roche* (for the shipowners, the defendants).

[Reported by WENDY SHOCKETT, Barrister-at-Law.]

A

Re SKINNER (deceased).

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Sachs, J.), July 31, 1958.]

Company—Scheme of arrangement—Transfer of business of acting as personal representative—Probate action pending at date of transfer—Validity of provisions of scheme in relation to probate action—Whether transferor company should continue as plaintiff in probate action—Companies Act, 1948 (11 & 12 Geo. 6 c. 38), s. 206, s. 208.

B

Executor and Administrator—Office of personal representative—Company named as executor in will appointed administrator pending suit in probate action—Scheme of amalgamation of company with a bank—Transfer by company of its business of acting as personal representative to bank—Whether transferor company can continue as plaintiff in probate action.

C

Trust and Trustee—Trust corporation—Share capital of trust corporation acquired by another company on amalgamation—Transfer of business of acting as personal representative—Whether corporation continues to be a trust corporation within the definition in Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 Geo. 5 c. 49), s. 175 (1)—Public Trustee Rules, 1912 (S.R. & O. 1912 No. 348), r. 30 (1), as substituted by S.R. & O. 1926 No. 1423.

D

Grindlays Bank, Ltd., who were appointed executors under two wills of a testator who died in April, 1954, brought a probate action to prove one will in solemn form. On Apr. 18, 1956, Grindlays were appointed administrators pending suit. Before that date they had so acted in the estate as to dis-

E

entitle them to renounce their executorship under the will, if it were proved. On July 8, 1957, an order was made in the Chancery Division (Companies Court) under the Companies Act, 1948, s. 206 and s. 208, sanctioning a scheme of arrangement and amalgamation between Grindlays and the National Bank of India, Ltd.; by that scheme all assets (including the business of acting as

F

personal representative) and liabilities of Grindlays were transferred to the latter bank (herein called "National") as from the transfer date (Dec. 31, 1957), save for property vested in Grindlays as "the personal representative of a deceased person". The scheme further provided by cl. 7 (1), that, after the transfer date, Grindlays would not take out any grant of representation to the estate of any deceased person; and, by cl. 7 (2), that, from the transfer date until the date of dissolution of Grindlays, Grindlays would

G

perform their duties as the personal representatives of any deceased person whose personal representatives they were at the transfer date. On Nov. 7, 1957, the registrar of companies made an order under s. 208 providing that all proceedings pending by or against Grindlays on Jan. 1, 1958, other than those to which Grindlays were a party as the personal representative of any deceased person, should be continued by or against National. Grindlays

H

now applied for directions in the probate action (i) whether Grindlays should continue as plaintiffs or National should be substituted and (ii) whether either could or should act as personal representatives of the deceased. The whole share capital of Grindlays having become vested in National the further question arose whether Grindlays remained a trust corporation within the definition in s. 175 of the Supreme Court of Judicature (Consolidation) Act, 1925, which included a corporation authorised by rules under the Public Trustee Act, 1906, s. 4 (3), to act as custodian trustee. By the Public Trustee Rules, 1912, r. 30 (1) (as substituted in 1926), a corporation in order to be authorised must be one "having a capital . . . for the time being issued of not less than £250,000, of which not less than £100,000 shall have been paid up in cash."

I

Held: Grindlays should continue to act as plaintiffs in the probate action and could act as personal representatives of the deceased, if probate or letters of administration were granted to them, for the following reasons—

(i) if, on a proper construction of the scheme of amalgamation, some provision of it prohibited the doing of an act which, in the absence of the scheme a party thereto could be compelled to do or could not bind itself to refrain from doing, that provision was a nullity (see p. 276, letter I, post).

Nokes v. Doncaster Amalgamated Collieries, Ltd. ([1940] 3 All E.R. 549) and *Re "L" Hotel Co., Ltd. & Langham Hotel Co., Ltd.* ([1946] 1 All E.R. 319) applied.

(ii) according to (a) even if the order of Nov. 7, 1957, ordered that the probate action should be continued by National (which was a construction of the order contrary to the court's view) such a provision of the order would be void and (b) if cl. 7 (1) of the scheme purported to prohibit Grindlays from taking out representation to the deceased's estate the prohibition would be of no effect, for both these provisions would prohibit something that Grindlays could be compelled to do or could not, under the general law, bind themselves to refrain from doing.

(iii) Grindlays remained a trust corporation within s. 175 of the Supreme Court of Judicature (Consolidation) Act, 1925, since they still remained a legal entity and had an issued capital that complied with r. 30 (1) of the Public Trustee Rules, 1912, as substituted in 1926.

[As to acts of executor before probate, see 16 HALSBURY'S LAWS (3rd Edn.) 133, para. 201, note (i); and for cases on the subject, see 23 DIGEST (Repl.) 52-56, 404-450.]

As to non-assignability of office of executor, see 16 HALSBURY'S LAWS (3rd Edn.) 142, para. 223, note (u); and for cases on the subject, see 23 DIGEST (Repl.) 43, 302.

As to transfer of property or liabilities on amalgamation of companies, see 6 HALSBURY'S LAWS (3rd Edn.) 773, para. 1559, notes (a) (b); and for cases on the subject, see 10 DIGEST (Repl.) 1136, 1137, 7911, 7912.

For the Companies Act, 1948, s. 206, s. 208, see 3 HALSBURY'S STATUTES (2nd Edn.) 624, 627.

For the Supreme Court of Judicature (Consolidation) Act, 1925, s. 163 (1), s. 175, see 9 HALSBURY'S STATUTES (2nd Edn.) 779, 787; and for the Administration of Estates Act, 1925, s. 9, see *ibid.*, 727.

For the Public Trustee Rules, 1912, r. 30, as amended, see 22 HALSBURY'S STATUTORY INSTRUMENTS 299 and Supplement.]

Cases referred to:

(1) *Nokes v. Doncaster Amalgamated Collieries, Ltd.*, [1940] 3 All E.R. 549; [1940] A.C. 1014; 109 L.J.K.B. 865; 163 L.T. 343; 10 Digest (Repl.) 1136, 7911.

(2) *Re "L" Hotel Co., Ltd. & Langham Hotel Co., Ltd.*, [1946] 1 All E.R. 319; 115 L.J.Ch. 129; 174 L.T. 302; 10 Digest (Repl.) 1137, 7912.

(3) *Everitt v. Everitt*, [1948] 2 All E.R. 545; 27 Digest (Repl.) 593, 5547.

Probate Summons adjourned into court:

In this probate action Grindlays Bank, Ltd. (hereinafter called "Grindlays"), one Hedy Steiner and one Moyra Ratigan, claimed as the executors named in the last will dated Mar. 27, 1954, of James Richard Rennell Skinner who died on Apr. 2, 1954, to have that will established. The first two defendants, Norman Kent and Enid Kent, sought by way of counterclaim to set up an earlier will dated Dec. 8, 1948, wherein they were named as legatees. The third defendant, Julia Carole Skinner, the person entitled to the whole of the deceased's estate in the event of an intestacy (an infant appearing by her guardian) alleged by way of counterclaim that there was an intestacy, and alternatively sought to set up the will of Dec. 8, 1948. In the 1948 will, Grindlays were appointed sole executors.

On Apr. 18, 1956, KARMINSKI, J., made an order appointing Grindlays to

A be administrators pending suit. On July 8, 1957, ROXBURGH, J., made an order under s. 206 and s. 208 of the Companies Act, 1948, sanctioning a scheme of arrangement and amalgamation between Grindlays and National Bank of India, Ltd., and on Nov. 7, 1957, Mr. Registrar BERKELEY made a further order in relation thereto under s. 208. On Jan. 1, 1958, National Bank of India, Ltd. changed its name to National and Overseas Grindlays Bank, Ltd. (hereinafter called "National").

By the present summons Grindlays applied for directions as to the following matters:

"(1) Whether Grindlays do continue to act as first plaintiff in the [probate] action.

C "(2) Whether National be substituted for Grindlays as a plaintiff in the [probate] action.

"(3) Whether if the will of Mar. 27, 1954, is proved probate or alternatively a grant of administration of the deceased's estate with the said will annexed could be granted to Grindlays or to National or to some other, and if so what persons.

D "(4) Whether if the will of Dec. 8, 1948, is proved probate thereof or alternatively a grant of administration of the deceased's estate with the will annexed could be granted to Grindlays or to National or to some other, and if so, what persons . . ."

D. Tolstoy for Grindlays.

A. R. Ellis for the first two defendants, Norman Kent and Enid Kent.

E *R. L. Bayne-Powell* for the third defendant.

O. R. Smith for National.

Cur. adv. vult.

July 31. SACHS, J.: This is a summons in an action commenced in August, 1955, by Grindlays Bank, Ltd., and two other plaintiffs, by which they seek to propound a will of the testator of March, 1954—"the 1954 will." In that will they and their two co-plaintiffs are named as executors. All three defendants contest the will. The first two seek to establish a will of December, 1948 ("the 1948 will"), of which Grindlays are the sole executor. The third defendant alleges an intestacy. On Apr. 18, 1956, Grindlays were appointed administrator pending suit, and on Apr. 4, 1957, the pleadings were closed by a reply and defence to counterclaims delivered on that date.

G By an order of July 8, 1957, sanction was given by ROXBURGH, J., to a scheme of arrangement and amalgamation under s. 206 and s. 208 of the Companies Act, 1948, in the course of proceedings between Grindlays Bank, Ltd.—"Grindlays"—the members of Grindlays Bank, Ltd., and the National Bank of India, Ltd.—"National." At that last named date the whole of the £500,000 paid up capital of Grindlays was beneficially owned by National and the scheme transferred to National, subject to certain exceptions, the whole of Grindlays' assets and liabilities as from Dec. 31, 1957, which was called the transfer date. Grindlays, to whom National gave certain very full indemnities, continue their existence but will at some future date be dissolved without being wound up. The date in question will be one after they have ceased to hold any property either as the trustee of any instrument or as the personal representative of any deceased person.

I On Nov. 7, 1957, an order in furtherance of the above scheme was made by Mr. Registrar BERKELEY, and one of its provisions, to the terms of which I will later refer, related to proceedings then pending by or against Grindlays.

The purpose of the present summons is to determine what is the position of Grindlays and National respectively in relation to the present proceedings. In particular, having regard to the terms of the scheme and of the order of Nov. 7, decisions are sought, first, whether either of them can or should continue the

present action; secondly, whether either of them can or should act as personal representative of the deceased if either the 1954 or the 1948 will is proved. The answers to the questions put to the court depend partly on the view taken of the general law as to the position of executors and the effect of s. 206 and s. 208 of the Companies Act, 1948, and partly on the construction of the particular scheme in this case. A wide range of points has been helpfully discussed by counsel in argument on the basis of alternative views as to the general law, but I do not propose to deal with any of them except those which arise on the footing that the position is as below stated.

First, it has been axiomatic since before the days of BLACKSTONE'S COMMENTARIES that at common law there can be no assignment of the office of executor as it is an office of personal trust. Leaving out of consideration certain specific statutory provisions (such as those of the Public Trustee Act, 1906*), which do not apply to the present circumstances, it follows that the rights, powers and duties of an executor cannot be assigned by him; nor can an executor properly assign property he holds by virtue of his office, save in the course of carrying out his duties under that office. It is to be noted that not only is the office of executor one of personal trust but that third parties (such as those who may take under the will) have an interest in seeing that no such assignment by an executor takes place.

Secondly, it has during the hearing of this summons become common ground that already before Apr. 18, 1956, when they were appointed as administrators pending suit, Grindlays had so acted as executors as to disentitle them to renounce that position under the 1954 will, and also so as to entitle the court to compel them, if thought fit, to continue to act as executors under that will if proved. Further, by virtue of the above order of Apr. 18, 1956, the property of the deceased vested in Grindlays by virtue of s. 163 of the Supreme Court of Judicature (Consolidation) Act, 1925; remained vested in them on the transfer date, that is to say, Dec. 31, 1957; and will continue to remain vested in them unless and until some order of this court provides otherwise. It is convenient, moreover, to note that if either of the two wills is proved then the property will be shown to be vested in them as personal representatives of the deceased at the date of his death, whilst if it is found that there is an intestacy, the property will at that date have vested in the President of this Division by virtue of s. 9 of the Administration of Estates Act, 1925. In no event can it be held to have vested or be today vested in National.

Thirdly, it has been made clear by the speeches in *Nokes v. Doncaster Amalgamated Collieries, Ltd.* (1) ([1940] 3 All E.R. 549) that schemes and orders made by virtue of s. 206 and s. 208 of the Companies Act, 1948, can only transfer such rights, powers, duties and property as are capable of being lawfully transferred by a party to the scheme if no such sections of the Companies Act existed. It is not necessary in a scheme to exclude specifically from its operation things incapable of such transfer as general words in the scheme and any order in furtherance thereof must be taken to operate in a manner not repugnant to the general law of England (*Re "L" Hotel Co., Ltd. & Langham Hotel Co., Ltd.* (2), [1946] 1 All E.R. 319). If, however, on a proper construction of the terms of a scheme some part of it happens by inadvertence expressly to order an act which, had there been no scheme, the parties could not, either in relation to the interests of third parties or otherwise, bind themselves to do, then that part of the scheme would, in my view, have to be treated as a nullity in so far as it purported so to order. To my mind, this latter principle equally applies where a scheme expressly prohibits an act which the parties could not, under the general law of this country, bind themselves to refrain from doing.

The general law being as above stated, I now turn to the terms of the scheme

* See Public Trustee Act, 1906, ss. 5, 6, 15 (26 HALSBURY'S STATUTES, 2nd Edn. 36-38, 45); see also s. 1 (2) of the Judicial Trustees Act, 1896 (26 HALSBURY'S STATUTES, 2nd Edn. 24).

- A and of the order of Nov. 7. The scheme recites that Grindlays "carries on . . . the business of . . . acting as . . . personal representative." It transfers that business and its assets to National, but by virtue of its definition clause excludes from that transfer "property vested in Grindlays as . . . the personal representative of a deceased person." It is accordingly clear that no property of the deceased purports to have become vested in National by virtue of the scheme.
- B Next to be noted is that part of the order of Nov. 7, which provides that
- "all proceedings pending by or against the transferor company on Jan. 1, 1958, other than those to which the transferor company is a party as the personal representative of any deceased person, be continued by or against the transferee company."
- C On a normal construction of these words the present action is not one ordered to be continued by National. If, contrary to my view, the above words "personal representative" had in the context of the scheme as a whole to be construed as meaning "personal representative who had been granted probate," then the order would purport to cause a right or duty of Grindlays as an executor to be carried out by some third party, would contain a provision repugnant to the
- D general law of this country and would to that extent have had to be treated as of no effect. There is no other provision in the scheme or order that can lay on National any of the rights, duties, or powers of an executor of the deceased, and accordingly it follows that National is neither entitled to be nor can be substituted as a plaintiff in this action, nor can there be granted to National probate of the 1954 or of the 1948 will.
- E There remains the question whether Grindlays are entitled to and should continue to act as plaintiffs in the action; and if so, whether probate can be granted to them if either the 1954 or the 1948 will is proved. Any difficulty on this point derives from the provisions of sub-clauses of cl. 7 of the scheme. The following are the portions of sub-cl. (1) and sub-cl. (2) that are relevant:
- F " (1) After the transfer date Grindlays shall not take out or cause to be taken out any grant of representation to the estate of any deceased person . . .
- " (2) During the period from the transfer date to the date on which Grindlays is dissolved, in accordance with the provisions of this scheme, Grindlays shall duly perform (i) its duties as the personal representative of any deceased person whose personal representative it was at the transfer date . . . (iii) its duties as the trustee of any instrument of which it was the
- G trustee at the transfer date."

H Clause 7 (1) either purports to prohibit Grindlays continuing to proceed with this action or it does not. If it does not so prohibit Grindlays, then clearly they can continue to proceed herein because nothing else in the scheme prevents them from so doing. If, on the other hand, it does purport so to prohibit them, then to that extent it purports to stop Grindlays from doing something which the law empowers them to do, and also from performing a duty which the court can compel them to perform and one in which third parties are interested.

I Accordingly, if cl. 7 (1) does prohibit Grindlays from taking out a grant of representation in the present case it is to that extent to be disregarded and treated as of no effect, as the prohibition would be one which cannot properly be embodied in a scheme under s. 206 and s. 208. Thus, whichever I adopt of the rival interpretations of cl. 7 (1) put forward by counsel for Grindlays and counsel for National respectively, whether or not on its proper construction cl. 7 (1) purports to prohibit the continuance of the present action, Grindlays in law can and indeed should continue to act as first plaintiffs in it.

It has been submitted by counsel for National that the vital words in sub-cl. (1) on a natural construction mean exactly what they say and constitute a relevant prohibition. Counsel for Grindlays has put forward a more intricate argument to the contrary—an argument which included a submission that there

has been an unusual use of the words "take out" in relation to probate. For the purposes of the summons now before me it has, however, been agreed by both counsel that if it is my view that on either interpretation of cl. 7 (1) Grindlays are not in law effectually prohibited from continuing with the present action, then it is not necessary for me to express a final view on the construction of that sub-clause. Indeed, any such expression might well be considered in the circumstances to be obiter (cf. *Everitt v. Everitt* (3), [1948] 2 All E.R. 545 at p. 549). Accordingly, I do not propose to go further than to state that on the facts of the present case I would have found some difficulty in escaping from the prima facie impression that the words in sub-cl. (1) have the natural and plain meaning attributed to them by counsel for National.

The only other point which needs to be dealt with is the submission that Grindlays have since the transfer date ceased to be a trust corporation within the definition of those words in s. 175 of the Supreme Court of Judicature (Consolidation) Act, 1925. If they are no longer such a trust corporation, then difficulties would arise whether and in what form probate could or should be granted to them or their syndic or nominee in the event of one of the wills being proved. Reference has been made to r. 30 of the Public Trustee Rules, 1912, which provides (by sub-r. (1) (b)*) that such a corporation must, inter alia, be one

"... having a capital (in stock or shares) for the time being issued of not less than £250,000, of which not less than £100,000 shall have been paid up in cash ..."

It has been submitted by counsel for National that as the whole of Grindlays' £500,000 capital is now vested in National, and as since the transfer date all the beneficially owned assets of Grindlays have been vested in or are held in trust for National, the position of Grindlays is equivalent to that which would obtain if Grindlays had returned all its capital to its shareholders. It has further been submitted that in those circumstances Grindlays have ceased to be a trust corporation. The Public Trustee Rules, 1912, however, have chosen to make the qualification for a trust corporation a matter of capital and not a matter of assets. Grindlays still exist as a legal entity, their capital still complies with the test laid down in the Public Trustee Rules, and in my view they thus remain a trust corporation. Accordingly, there is no obstacle to their being granted probate as such.

My answers to the questions† as set out in the summons are accordingly as follows: (1) Yes. (2) No. (3) and (4) Probate of either will, if proved, can be granted to Grindlays. As regards costs, National have very properly stated that they are prepared to bear all the costs of all parties to this summons, and I make the order accordingly, to include certificates for counsel.

Order accordingly.

Solicitors: *Henry S. L. Polak & Co.* (for the first, second and third plaintiffs); *Ellis, Peirs & Co.* (for the first and second defendants); *O. L. Blyth* (for the third defendant); *Sanderson, Lee, Morgan, Price & Co.* (for National and Overseas Grindlays Bank, Ltd.).

[Reported by A. T. HOOLAHAN, Esq., Barrister-at-Law.]

* As substituted by the Public Trustee (Custodian Trustee) Rules, 1926 (S.R. & O. 1926 No. 1423).

† The questions are printed at p. 275, letters B to D, ante.

A SMITH AND OTHERS v. WYLES.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Donovan and Ashworth, JJ.), July 28, 29, 30, August 20, 1958.]

Gaming—Lottery—Whether participating in a lottery was gaming.

B *Licensing—Offences—Gaming on licensed premises—Small lottery—Whether a small lottery that was exempted from illegality under Betting and Lotteries Act, 1934 (24 & 25 Geo. 5 c. 58), s. 21 could lawfully be conducted on licensed premises—Licensing Act, 1953 (1 & 2 Eliz. 2 c. 46), s. 141 (1)—Small Lotteries and Gaming Act, 1956 (4 & 5 Eliz. 2 c. 45), s. 1, s. 5 (1).*

C A club, which was registered under the Small Lotteries and Gaming Act, 1956, held a small lottery, which by virtue of s. 1 of the Act was deemed not to be an unlawful lottery, on licensed premises with the knowledge and approval of the licensee. Tickets were sold in the bar of the licensed premises, and on purchase of a ticket the purchaser selected two numbers between one and twenty. On a subsequent occasion balls each bearing numbers from one to twenty were placed in a canister and, after revolving the canister, first one ball and then a second were released from it. The holder of the ticket D who had selected the combination of numbers corresponding to those on the two balls released was entitled to a prize. On appeal by the licensee against conviction for suffering "gaming . . . to be carried on in his premises" contrary to s. 141 (1) of the Licensing Act, 1953, and on appeal by two officers of the club, who had conducted the lottery, against convictions for aiding and abetting the commission of the offence,

E **Held:** the convictions were right because—

(i) (per ASHWORTH and DONOVAN, JJ.) on the facts participating in this lottery was gaming, and (per LORD GODDARD, C.J.) participating in a lottery was gaming (*Morris v. Baguley*, [1937] B.T.R.L.R. 73 followed) and

F (ii) no exemption from s. 141 of the Licensing Act, 1953, was created by the Small Lotteries and Gaming Act, 1956.

Per ASHWORTH and DONOVAN, JJ.: the defence provided by s. 22 (2) of the Betting and Lotteries Act, 1934, was available in the case of the lotteries exempted from illegality by virtue of the Small Lotteries and Gaming Act, 1956, s. 1 or s. 4 (cf. *ibid.*, s. 5 (1) and p. 282, letter I, post).

Appeals dismissed.

G [As to lawful small lotteries, see 18 HALSBURY'S LAWS (3rd Edn.) 245, para. 471; as to gaming on licensed premises, see 22 HALSBURY'S LAWS (3rd Edn.) 685, 686, paras. 1462, 1463; and for cases on the subject, see 25 DIGEST 429-431, 294-307.

H For the Licensing Act, 1953, s. 141 (1), see 33 HALSBURY'S STATUTES (2nd Edn.) 269; for the Small Lotteries and Gaming Act, 1956, s. 1, s. 4, s. 5, see 36 HALSBURY'S STATUTES (2nd Edn.) 362, 367, 368; and for the Betting and Lotteries Act, 1934, s. 21, s. 22, s. 23, s. 24, see 10 HALSBURY'S STATUTES (2nd Edn.) 801-805.]

Cases referred to:

- I (1) *Morris v. Baguley*, [1937] *Brewing Trade Review Law Reports* 73.
 (2) *Young v. Bristol Aeroplane Co., Ltd.*, [1944] 2 All E.R. 293; [1944] K.B. 718; 113 L.J.K.B. 513; 171 L.T. 113; *affd.* H.L., [1946] 1 All E.R. 98; [1946] A.C. 163; 30 Digest (Repl.) 225, 691.
 (3) *Huddersfield Police Authority v. Watson*, [1947] 2 All E.R. 193; [1947] K.B. 842; [1948] L.J.R. 182; 177 L.T. 114; 111 J.P. 463; 30 Digest (Repl.) 229, 734.

Case Stated.

The licensee of a public house was also president of a bowling club registered under the Small Lotteries and Gaming Act, 1956. A small lottery was conducted

on behalf of the club on two occasions on the licensed premises in manner complying with s. 1 of the Act of 1956. The method of carrying out each lottery was by the sale of sixpenny tickets on the purchase of which the purchaser selected two numbers each between one and twenty; subsequently a draw was made by placing in a canister balls numbered from one to twenty, revolving the canister and releasing from it one ball and then another. The ticket holder whose numbers corresponded to those on the released balls was entitled to a prize. The licensee was convicted of two offences of suffering gaming to be carried on on licensed premises contrary to s. 141 (1) of the Licensing Act, 1953. Two other officers of the club were convicted of aiding and abetting the licensee. The licensee and the officers of the club appealed by Case Stated against their convictions.

Sir Frank Soskice, Q.C., and S. Brown for the appellants.

B. S. Wingate-Saul for the respondent, the prosecutor.

Cur. adv. vult.

Aug. 20. **LORD GODDARD, C.J.:** ASHWORTH, J., will deliver the first judgment.

The following judgments were then read.

ASHWORTH, J.: This is an appeal by way of Case Stated from a decision of the learned stipendiary magistrate for the City of Birmingham whereby he convicted the appellant Smith of two offences against s. 141 (1) of the Licensing Act, 1953, and the appellants Barnes and Bishop of aiding and abetting those offences. The appellant Smith was at all material times the licensee of a public house known as the Deer's Leap and situate at Kingstanding in the City of Birmingham, and it was alleged against him that on Nov. 24 and again on Dec. 1, 1957, he suffered gaming to be carried on on his licensed premises. The three appellants were at all material times the President, Vice-President and Secretary respectively of a bowling club known as the Deer's Leap Bowling Club, and the headquarters of the club were situate at the licensed premises. In October, 1957, the club was duly registered under the provisions of the Small Lotteries and Gaming Act, 1956 (hereinafter referred to as the Act of 1956) for the purpose of promoting a lottery in accordance with that Act. The three appellants are all men of excellent character and repute.

On Nov. 22, 23 and 24, 1957, the appellants Barnes and Bishop sold a number of sixpenny tickets for a lottery promoted by the club: these sales took place in the bar of the Deer's Leap and the appellant Smith saw and approved such sales. On the evening of Nov. 24 a draw took place under the supervision of the appellant Barnes in the smoke room of the Deer's Leap, the method adopted involving the use of a canister containing table tennis balls and the release therefrom of two numbered balls. The holder of the lottery ticket who had selected on purchase the combination of the two numbers which corresponded with those on the two balls released from the canister was entitled to a prize. On Nov. 30, 1957, in the Deer's Leap the appellants Barnes and Bishop again sold tickets for a lottery promoted by the club and a draw was made on Dec. 1 in the manner described above. The appellant Smith knew and approved of the draw taking place. Each of the two lotteries was conducted by the appellants Barnes and Bishop on behalf of the club and in aid of the club funds.

The decision of the learned stipendiary magistrate was expressed in the following words:

"I was of opinion that what took place in this case, whether it is called a lottery or a sweepstake or is regarded as more analogous to such a game as roulette where the player selects the number he wishes to back, was undoubtedly gaming."

This decision was challenged on two main grounds: first, it was said that on the facts the events which took place at the Deer's Leap could not properly be

A regarded as gaming: secondly, it was said that even if the holding of such a lottery as is referred to in s. 1 of the Act of 1956 does amount to gaming, the effect of that Act and the Betting and Lotteries Act, 1934 (hereinafter referred to as the Act of 1934) is to render such gaming when it occurs on licensed premises not an offence within the scope of s. 141 of the Licensing Act, 1953.

The first of these submissions involves the problem of what is meant by gaming.

B There appears to be no statutory definition of the word and, although there are many reported cases in which the meaning of the word has been considered, I am not for my part satisfied that there is to be found in any of them a definition which can be applied generally. Counsel for the appellants contended that gaming involves something in the nature of a game in which the players not only participate but participate continuously: accordingly it was submitted that a

C person who buys a lottery ticket on a given day when the draw is not due to take place until one or more days have elapsed and the purchaser of the ticket may well be absent, is not gaming. In my judgment this contention places too restricted a meaning on the word "gaming". Undoubtedly some games involve gaming but it does not follow that gaming involves a game. Moreover I do not think that the time factor enters into the problem in the way suggested on behalf

D of the appellants. It was conceded that persons who play roulette are gaming; they are staking their money in a proceeding the outcome of which is dependent merely on chance. Like the learned stipendiary magistrate, I take the view that there is no difference in principle between that form of proceeding and the one involved in the present case, where the stake is represented by a ticket and the outcome is dependent on two numbered balls released from a canister and

E not one ball spun on a roulette board.

It is true that in places the relevant statutes appear to draw a distinction between lotteries and gaming: for example, in s. 24 (1) (a) of the Act of 1934 reference is made to "purposes not connected with gaming, wagering or lotteries". Moreover, in the Act of 1956, lotteries and gaming parties are treated separately. But in my view these provisions do not justify the inference that

F lotteries and gaming are, so to speak, mutually exclusive terms. The truth is that some lotteries involve gaming and some do not, just as some gaming involves a lottery and some does not. The facts of each case relating to a lottery require separate consideration in order to determine whether that lottery constitutes gaming or not.

In the course of the argument reference was made to *Morris v. Baguley* (1),

G a decision of this court given in 1937 in which the problem now under consideration was raised. There is no properly authenticated report of the decision but it is mentioned in the *Brewing Trade Review Law Reports* for that year [at p. 73]. The original Case Stated was obtained from the Crown Office and from that document it was clear that the question raised for the consideration of this court was whether the drawing of a sweepstake constituted gaming. The drawing took

H place on licensed premises and the licensee was charged with having suffered gaming to be carried on on his licensed premises contrary to s. 79 of the Licensing (Consolidation) Act, 1910. The justices held that gaming had not taken place and the informant appealed. It was held by this court that gaming had in fact been suffered on licensed premises. It is only right to add that the respondent

I licensee was not represented at the hearing of the appeal.

On the question, therefore, whether the drawing of a sweepstake or lottery constitutes gaming, that case appears to be a decision directly in favour of the present respondent and counsel for the appellants sought to avoid its consequences by contending that it was not binding on this court for one of the reasons given in *Young v. Bristol Aeroplane Co., Ltd.* (2) ([1944] 2 All E.R. 293) and applied in *Huddersfield Police Authority v. Watson* (3) ([1947] 2 All E.R. 193), namely, that it was given per incuriam. I can see no reason why the decision in *Morris v. Baguley* (1) should be so regarded, and, quite apart from any views of

my own, I should feel bound by it; but, as already indicated, I have come to the same conclusion independently, and in my view the first submission of the appellants fails. A

The second submission involves consideration of the relevant statutory provisions. It is convenient to start with the Act of 1934. Section 21 provides that subject to the provisions of Part 2 of the Act all lotteries are unlawful. Section 22 (1) contains a list of offences in connexion with lotteries of which para. (f) is of particular relevance: B

“uses any premises, or causes or knowingly permits any premises to be used, for purposes connected with the promotion or conduct of the lottery.”

Section 22 (2) provides that in any proceedings instituted under the preceding sub-section it shall be a defence to prove that the lottery was such a lottery as is declared by any subsequent section of Part 2 not to be an unlawful lottery. Sections 23 and 24 each contain provisions whereby lotteries falling within their limited scope are deemed not to be unlawful lotteries. I shall refer to such lotteries as exempted lotteries. C

It may be noted that the Act of 1934 contained no specific provision relating to licensed premises. Accordingly, a licensee on whose premises a lottery was conducted might be charged with a contravention of s. 22 (1) (f), unless the lottery was an exempted lottery. Further, if the lottery involved gaming and was conducted on his premises, he might also be charged with a contravention of the Licensing (Consolidation) Act, 1910, as was in fact done in *Morris v. Baguley* (1). The next relevant Act is the Licensing Act, 1953, but in my view there is no material difference between s. 141 of that Act and s. 79 of the Licensing (Consolidation) Act, 1910, and I need not refer to the terms of either section in detail. D

The Small Lotteries and Gaming Act, 1956, is, however, of great importance. By virtue of s. 1 certain small lotteries conducted for charitable, sporting or other purposes are deemed not to be unlawful lotteries, providing certain conditions are observed. Section 4 deals with a limited class of entertainments at which games of chance or of chance and skill combined are played and by sub-s. (2) provides that places where such entertainments are held shall not be deemed to be common gaming houses. Sub-section (3) provides that a game played at an entertainment to which the section applies in accordance with the prescribed conditions shall not be deemed to be an unlawful lottery. If one analyses the position at this stage, the result is that there have been two additions to the pair of exempted lotteries mentioned in s. 23 and s. 24 of the Act of 1934. These additions are a small lottery falling within s. 1 of the Act of 1956 and a game played at an entertainment falling within s. 4. But a person who used premises or permitted premises to be used for either of these additional lotteries would still have been liable to prosecution for an offence under s. 22 (1) (f) of the Act of 1934, as the defence provided by s. 22 (2) is only applicable in the case of lotteries declared not to be unlawful by any subsequent section in Part 2 of that Act. In order to meet this situation the draftsman provided a somewhat oblique remedy by including in s. 5 of the Act of 1956 a provision that the Act of 1934 should have effect as if s. 1 and s. 4 of the Act of 1956 were included in Part 2 of the Act of 1934. The defence provided by s. 22 (2) of the Act of 1934 is therefore available in the case of the additional exempted lotteries. E F G H I

It is now necessary to consider the effect of sub-s. (6) of s. 4 of the Act of 1956 which provides:

“Nothing in this section shall be construed as affecting the operation of

- A any of the following enactments, that is to say—(a) s. 141 of the Licensing Act, 1953 . . . ”

The inclusion of this provision in this section and the omission of any corresponding provision in s. 1 of the Act of 1956 are the points on which I have felt most doubt. If it was the intention of the legislature to maintain the full force

- B and effect of s. 141 in relation to exempted lotteries and to dispel any doubts as to its applicability, one might have supposed that the Act of 1956 would contain a separate section: Nothing in this Act shall be construed as affecting the operation of s. 141. Furthermore, the explanation that sub-s. (6) was included in s. 4 ex majore cautela is not very convincing, since s. 1 would appear to call for the same degree of caution. On the other hand, I find no less difficulty
C in accepting counsel for the appellants' contention that by implication s. 141 is rendered inapplicable to lotteries falling within s. 1 of the Act of 1956. The omission of any reference to s. 141 in s. 1 of the Act of 1956 may be said to afford some support for the contention that lotteries within s. 1 do not involve gaming and therefore no reference to s. 141 was called for, but I have already stated my
D conclusion that such lotteries may (and in the present case did) involve gaming. For my part I am not prepared to take the further step of deducing, from the omission of any reference to s. 141 in s. 1 of the Act of 1956, that s. 141 ceased to apply to the gaming (if any) involved in a lottery under that s. 1.

- Although I do not feel confident on the point, I am inclined to think that the draftsman treated lotteries falling within s. 1 of the Act of 1956 on the same basis
E as the lotteries exempted under s. 23 and s. 24 of the Act of 1934: no special reference to the provisions of the Licensing (Consolidation) Act, 1910, had been thought necessary in regard to those exempted lotteries, and therefore none was required in respect of the lotteries exempted under s. 1 of the Act of 1956 which are lotteries properly so called. On the other hand, s. 4 was introducing something
F different, namely, the exemption of gaming parties which might or might not be lotteries, and in respect of these a reference to s. 141 was thought to be necessary.

- Whatever may be the true explanation, I am of opinion that once it is established that gaming is involved, a licensee cannot lawfully suffer it to take place on his licensed premises. In my judgment, s. 141 of the Licensing Act, 1953, was not affected by the Act of 1956, and accordingly this appeal should be dismissed.
G DONOVAN, J., has authorised me to say that he agrees with this judgment.

- LORD GODDARD, C.J.: I agree that this appeal fails. I have come to this conclusion by a shorter route as in my opinion the only question that falls for decision is whether the conduct of a lottery is a form of gaming. If it is, in my
H opinion it cannot be conducted on licensed premises although it is one which otherwise would be exempted from penalties. The legislature has always been at pains to prohibit public houses being used for the purpose of gambling whether by betting or gaming, and in my opinion s. 4 (6) of the Small Lotteries and Gaming Act, 1956, is intended to maintain this absolute prohibition, notwithstanding that a particular form of gaming for particular purposes is exempted
I from penalties if conducted elsewhere. Apart from authority I think that participating in a lottery is gaming and I agree with the learned stipendiary that it is analogous to a game of roulette. In the one case the player buys a numbered ticket which if drawn gains a prize, in the other he chooses a number on a board and if the ball stops at that number he wins. If the latter is gaming, and no one could argue the contrary, I cannot see why the former is not. Moreover, the decision in *Morris v. Baguley* (1) is directly in point; the short report to which our attention was called [(1937) *Brewing Trade Review* 73] does not appear

to have been reported by a member of the Bar and apparently it was only argued on one side. But we sent for the Case Stated, from which it is clear that the only question submitted was whether the drawing of a lottery was gaming, and that this court held that it was. Even if I did not agree with the decision I should feel I was bound by it. That case was decided after the Betting and Lotteries Act, 1934, had been passed, and in my opinion is conclusive, as indeed I understood counsel for the appellants to agree that it was if we were of opinion that it was binding on us. I agree that the lottery with which this case deals falls within the exemptions conferred by the Act of 1956, but the prohibition of gaming on licensed premises still remains, so to gain immunity it must be conducted elsewhere. It is true that the Act deals with both lotteries and gaming, but, though lotteries (of which a sweepstake is a common example) are only one form of gaming, carried out by the drawing of a numbered ticket, if Parliament had intended to make so startling a departure from its previous policy as to allow lotteries of any description in public houses while still prohibiting other gaming, I should have expected some very clear words to effect such a change.

Before parting with this case I should like to say, as I have said on other occasions, that I think that it is unfortunate that decisions of this court on matters relating to criminal law can never be the subject of appeal. I feel no doubt as to the correctness of the decision in *Morris v. Baguley* (1), but supposing that we had felt that it was wrong or at least open to question, we should none the less be bound by it. It does happen from time to time that this court has to follow a decision with which they find it difficult to agree, and if their decision were open to appeal both the instant case and that which it followed could be reviewed. I continue to hope that the time will come when by leave, and subject perhaps to terms as to costs, it will be possible to take either to the Court of Appeal or perhaps direct to the House of Lords a decision of this court although it relates to a criminal cause or matter. The complexity of modern legislation, I feel sure, makes this desirable.

Appeal dismissed.

Solicitors: *Field, Roscoe & Co.*, agents for *Colin Langley & Smith*, Edgbaston (for the appellants); *Sharpe, Pritchard & Co.*, agents for *M. P. Pugh*, Birmingham (for the respondent).

[Reported by HENRY SUMMERFIELD, ESQ., Barrister-at-Law.]

A

HOCHSTRASSER (INSPECTOR OF TAXES) v. MAYES. JENNINGS v. KINDER (INSPECTOR OF TAXES).

[COURT OF APPEAL (Jenkins, Parker and Pearce, L.JJ.), June 9, 10, 11, July 7, 1958.]

B

Income Tax—Income—Indemnity to employee against loss on house purchase—Employers' housing assistance scheme—Reimbursement of loss on transfer to new place of employment—Income Tax Act, 1952 (15 & 16 Geo. 6 & 1 Eliz. 2 c. 10), Sch. 9, Rules applicable to Sch. E, r. 1.

C

In order to assist married male members of its staff to buy suitably located houses for occupation by themselves and their families in the event of their being transferred from one part of the country to another as a result of their employment, Imperial Chemical Industries, Ltd. operated a housing scheme under which it provided interest-free loans for the purchase of houses and guaranteed the employee against a loss through depreciation in the value of the house. Under the terms of the agreement signed by each employee taking advantage of the scheme, he was required, if he wished

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to sell or let the house on being transferred to a new place of employment in the company's service, to offer to sell the house first to the company. If the company accepted it, the employee received the current market value ascertained by valuation and if the company declined he was free to sell the house; and in either case he received from the company the amount by which the price fell short of his expenditure on the house. Further, if the employee

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(or his personal representatives) sold the house within twelve months after the company's refusal of an offer made on transfer, or after his retirement or death, he or his personal representatives became entitled to the amount by which the price fell short of his expenditure on the house, and, if in such case the house was not sold within the twelve months, to the amount by which a valuation fell short of such expenditure. If the employee wished

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to sell the house before any of these events occurred, he became entitled to the benefit of the guarantee, provided he obtained the company's consent and offered the house to the company. The employee was bound to keep the house in good tenantable repair. The agreement was to continue in force until twelve months after the employee's death, but ceased automatically on certain other eventualities (including retirement, cesser of

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employment, selling or letting or ceasing to use the house as a permanent residence).

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Two employees who had entered into agreements with the company under the housing assistance scheme suffered on transfer losses of £350 and £450 respectively on the sales of their houses and were paid or credited with these sums by the company. They were assessed to income tax under Sch. E in respect of the sums.

I

Held (PARKER, L.J., dissenting): the sums were not profits of the employees' employment and were not assessable to income tax under Sch. E, for they were not paid to the employees in their capacity as employees and for no consideration other than services, but were paid under a collateral agreement which, though available only to employees, was not entered into by virtue of the employment and without conditions (dicta of SIR RICHARD HENN COLLINS, M.R., and of STIRLING, L.J., in *Herbert v. McQuade* (1902), 4 Tax Cas. at pp. 500, 501, applied); moreover, a housing agreement was not a matter of mere bounty to the employee, for its nature was that of insurance against loss to him and it was also of benefit to the company by virtue of the conditions that it laid down, particularly that giving the company first refusal of the house and so enabling it to house a successor to the employee on his transfer.

Decision of UPJOHN, J. ([1958] 1 All E.R. 369) affirmed.

[Editorial Note. As from the year of assessment 1956-57 the relevant terms of para. 1 of Sch. E were superseded by those enacted in s. 10 (1) of the Finance Act, 1956. Under these, tax is still chargeable in respect of emoluments from "any office or employment" within the particular descriptions in s. 10 (1). Paragraph 1 of Sch. 9 to the Income Tax Act, 1952, is amended by the Finance Act, 1956, s. 44 and Sch. 5. A

As to taxation of collateral payments to the holder of an office or employment, see 20 HALSBURY'S LAWS (3rd Edn.) 322-324, para. 592; and for cases on the subject, see 28 DIGEST 85-88, 490-507. B

For r. 1 of the Rules applicable to Sch. E in Sch. 9 to the Income Tax Act, 1952, see 31 HALSBURY'S STATUTES (2nd Edn.) 522.]

Cases referred to:

- (1) *Seymour v. Reed*, [1927] A.C. 554; 96 L.J.K.B. 839; 137 L.T. 312; 11 Tax Cas. 625; Digest Supp. C
- (2) *Hartland v. Diggines*, [1926] A.C. 289; 134 L.T. 492; 10 Tax Cas. 247; 28 Digest 88, 506.
- (3) *Nicoll v. Austin*, (1935), 19 Tax Cas. 531; Digest Supp.
- (4) *Weston v. Hearn*, *Carmouche v. Hearn*, [1943] 2 All E.R. 421; 169 L.T. 374; 25 Tax Cas. 425; 2nd Digest Supp. D
- (5) *Edwards v. Roberts*, (1935), 19 Tax Cas. 618; Digest Supp.
- (6) *Dewhurst v. Hunter*, [1932] All E.R. Rep. 753; 146 L.T. 510; sub nom. *Hunter v. Dewhurst*, 16 Tax Cas. 605; Digest Supp.
- (7) *Beak v. Robson*, [1943] 1 All E.R. 46; [1943] A.C. 352; 112 L.J.K.B. 141; 169 L.T. 65; 25 Tax Cas. 33; 2nd Digest Supp.
- (8) *Herbert v. McQuade*, [1902] 2 K.B. 631; 71 L.J.K.B. 884; 87 L.T. 349; 66 J.P. 692; 4 Tax Cas. 489; 28 Digest 86, 492. E
- (9) *Moorhouse v. Dooland*, [1955] 1 All E.R. 93; [1955] Ch. 284; 36 Tax Cas. 1, 12; 3rd Digest Supp.
- (10) *Bridges v. Hewitt*, *Bridges v. Bearsley*, [1957] 2 All E.R. 281; 3rd Digest Supp.
- (11) *Cowan v. Seymour*, [1920] 1 K.B. 500; 89 L.J.K.B. 459; 122 L.T. 465; 7 Tax Cas. 372; 28 Digest 85, 490. F
- (12) *Tilley v. Wales*, [1943] 1 All E.R. 280; [1943] A.C. 386; 112 L.J.K.B. 186; 169 L.T. 49; sub nom. *Wales v. Tilley*, 25 Tax Cas. 136; 2nd Digest Supp.
- (13) *Inland Revenue Comrs. v. Westminster (Duke)*, [1935] All E.R. Rep. 259; [1936] A.C. 1; 104 L.J.K.B. 383; 153 L.T. 223; sub nom. *Westminster (Duke) v. Inland Revenue Comrs.*, 19 Tax Cas. 490; Digest Supp. G

Appeals.

The Crown appealed against orders of UPJOHN, J., made on Dec. 20, 1957, and reported at [1958] 1 All E.R. 369, on Cases Stated under s. 64 of the Income Tax Act, 1952.

In the first case the Crown appealed against a decision of the General Commissioners of Income Tax for Langbaugh East, Yorkshire, disallowing an assessment to income tax on the first taxpayer, Leonard Harry Mayes, in the sum of £1,170 for 1954-55 under Sch. E to the Income Tax Act, 1952 (s. 156), which included a sum of £350 paid or credited to him by his employers, the company, Imperial Chemical Industries, Ltd. The taxpayer had been employed by the company since December, 1941. In September, 1950, he was transferred from Welwyn, Hertfordshire, to the company's works at Hillhouse in Lancashire, and on Apr. 27, 1951, he entered into a service agreement with the company. He was first informed of the company's housing scheme at the time when he was transferred to Hillhouse. In June, 1951, he purchased No. 16, Ribble Road, Fleetwood, Lancashire, for £1,850. He was offered and accepted the housing agreement afforded by the company with respect to the house. He borrowed £300 of the purchase money on second mortgage from the company, H
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- A which paid all legal costs including stamp duties and the taxpayer's removal expenses to Fleetwood. In October, 1954, the taxpayer was transferred to Wilton in Yorkshire and offered his house for sale to the company in accordance with the housing agreement. The company declined to accept it, and the taxpayer sold it with the company's consent for £1,500. The loss on this sale, viz., £350, was made good to the taxpayer by the company.
- B The taxpayer contended that any benefit received by him under the housing scheme was to meet a loss of capital and therefore was not taxable and, further, that, if any taxable benefit was received by the taxpayer, it should have been assessed for the year 1950-51. The Crown contended that the £350 represented a profit from the taxpayer's employment for which he was chargeable to income tax and that no deduction in respect of it was allowable under r. 7 of Sch. 9 to the Income Tax Act, 1952. The commissioners decided that the £350 was a payment made against a capital loss and, being made to meet such a loss, was not assessable to income tax.
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- In the second case the taxpayer, Charles Maurice Jennings, appealed against a decision of the General Commissioners of Income Tax for Stockton Ward, County Durham, confirming an additional assessment to income tax in the sum of £450 made on him under Sch. E for 1953-54 in respect of a sum paid or credited to him by the company. The taxpayer joined the service of the company in July, 1944, when he lived in London. At that time he had no knowledge that the company provided any form of housing scheme and was not moved to join by the prospect of it. If there had been no housing scheme he would still have been employed by the company; he considered his remuneration to be adequate for the work which he did. An employee's salary was calculated by the company independently of anything which an employee might receive under the housing scheme. In January, 1949, he was transferred from London to Wilton, Yorkshire. In April, 1952, he was transferred to a post in London. In June, 1955, he was transferred to Billingham, Durham. On each of these transfers he acquired a house under the company's housing scheme. On the transfer following his first house purchase, he sustained a loss of £80 which was made good by the company. On his transfer in 1953 he sold his house with the consent of the company, which had declined to buy it, and made a loss of £450, which the company made good under the housing agreement. His costs and removal expenses were also paid by the company. The sum of £450 was not salary for services under the taxpayer's service agreement.
- E
- F The taxpayer contended that the £450 was received by him to meet a loss of capital and was not taxable, and that any benefit arising under the housing agreement was not a reward for his services. The Crown contended that the sum of £450 represented a profit or emolument of the taxpayer from his employment and was of an income nature and assessable to income tax under Sch. E and Sch. 9, r. 1 and r. 4 to the Income Tax Act, 1952. The commissioners decided that the sum of £450 was a profit or emolument from the taxpayer's employment within the meaning of r. 1 and r. 4 and that an additional assessment in respect of it was properly made on the taxpayer for 1953-54. They were also of opinion that the loss on the sale of the house in 1953 was not money wholly, exclusively and necessarily expended in the performance of the duties of the office or employment of the taxpayer within the meaning of r. 7 of Sch. 9 to the Income Tax Act, 1952. They, therefore, confirmed the additional assessment.
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On Dec. 20, 1957, UPJOHN, J., dismissed the Crown's appeal in the first case and allowed the taxpayer's appeal in the second case against the decisions of the commissioners, holding that the two sums were not profits arising from the taxpayer's employment but something collateral and so not taxable under Sch. E. The Crown appealed in each case to the Court of Appeal.

John Pennycuik, Q.C., and A. S. Orr for the Crown.

F. N. Bucher, Q.C., and Hubert H. Monroe for the taxpayers.

July 7. The following judgments were read.

JENKINS, L.J.: I have felt considerable difficulty over these two cases, but with some hesitation I have come to the conclusion that the appeals should be dismissed. I need not repeat the facts at length. The housing scheme established by the employing company, Imperial Chemical Industries, Ltd., was designed to assist married male members of the staff of the company to buy suitably located houses for occupation by themselves and their families in the event of their being transferred from one part of the country to another in the course of their employment by the company. The assistance provided consisted, in effect, of a contribution by the company towards the cost of the house in the form of an interest free loan, and a guarantee by the company indemnifying the employee concerned against loss through depreciation in the value of the house. No question arises in regard to the interest free loan. As regards the guarantee, admission to the scheme was to be effected by means of a standard form of housing agreement to be entered into between the company and the employee concerned, setting out in considerable detail the terms on which and circumstances in which the guarantee was to operate.

The respondent employees, the taxpayers, in these two appeals both bought houses on being transferred to new places of work and pursuant to the scheme both duly entered into housing agreements with the company. Both were later again transferred and sold their houses in consequence. The house in each case realised less on such sale than the taxpayer had paid for it, and under their guarantee the company paid or allowed in account to the taxpayer the appropriate sum in respect of such loss.

The sole question in each of the two appeals is whether the sum so paid or allowed by the company to the taxpayer was a profit of his employment and accordingly chargeable to income tax under Sch. E. The charge to tax under this Schedule is now contained in s. 156 of the Income Tax Act, 1952, which provides:—"The Schedule referred to in this Act as Sch. E is as follows . . ." and then follows Sch. E. Paragraph 1 reads:

"Tax under this Schedule shall be charged in respect of every public office or employment of profit . . ."

and so on. Then para. 2, which is the material paragraph for the purposes of the present case, provides:

"Tax under this Schedule shall also be charged in respect of any office, employment or pension the profits or gains arising or accruing from which would be chargeable to tax under Sch. D but for the proviso to para. 1 of that Schedule."

Then para. 5 provides:

"The provisions set out in Sch. 9 to this Act shall apply in relation to the tax to be charged under this Schedule."

Turning to Sch. 9, one finds r. 1 in the following terms:

"Tax under Sch. E shall be annually charged on every person having or exercising an office or employment of profit mentioned in Sch. E, or to whom any annuity, pension or stipend chargeable under that Schedule is payable, in respect of all salaries, fees, wages, perquisites or profits whatsoever therefrom for the year of assessment, after deducting the amount of duties or other sums payable or chargeable on the same by virtue of any Act of Parliament, where the same have been really and bona fide paid and borne by the party to be charged."

I think that those are all the statutory provisions to which I need at the moment refer.

A The objects with which the company established the housing scheme are thus described in para. 3 (g) of the Case Stated with respect to Mr. Mayes:

“ 3 (g) I.C.I. have to move a great number of their staff from one part of the country to another. The company recognises that the transfer of a married man involves him in domestic upheaval.

B “ Although a man might be willing to buy a house in the new location, his chief worry was the loss he might make if he had to sell the house. I.C.I. try to operate a staff policy which results in a contented staff. Unless the staff are contented they do not do their best work. I.C.I. therefore introduced the housing scheme so that they should have employees whose minds were eased to some extent of the worry of possible financial embarrassment in the future arising out of the removal occasioned by the company’s action.”

The Case Stated with respect to Mr. Jennings contains in para. 5 a description of the company’s objects which, though couched in different language, is substantially to the same effect.

D The housing agreements entered into by the company with the taxpayers, Mr. Mayes and Mr. Jennings, respectively are attached to the two Cases and I need not recite them in full. They are in the standard form used by the company for the purposes of their housing scheme, and their salient features for the purposes of the two appeals may be thus summarised:—

E (i) In the event of the employee being transferred to a new place of employment in the service of the company and consequently desiring to sell or let the house, the employee must offer to sell the house to the company. If the company accepts, then the house is to be bought by the company at the current market value ascertained by valuation; and if such value is less than the employee’s expenditure on the house the company becomes liable to pay the difference to the employee. If the company declines, then the employee is at liberty to sell

F to a third party and the company becomes liable to pay the employee the amount, if any, whereby the price realised falls short of his expenditure on the house (see cl. 2 of the agreements).

G (ii) In the event of the sale of the house by the employee or his personal representatives within twelve months after (a) the refusal by the company of an offer made on transfer under (i) above or (b) the retirement of the employee or (c) the death of the employee (whichever first happens) the company becomes liable to pay to the employee or his personal representatives the amount if any whereby the price realised on such sale falls short of the employee’s expenditure on the house (see cl. 3 (1)).

H (iii) If the house is not sold before the expiration of the period of twelve months mentioned in (ii) above, then there is to be a valuation of the house and the company becomes liable to pay to the employee or his personal representatives the amount (if any) whereby the employee’s expenditure on the house exceeds the amount of the valuation (see cl. 3 (2)).

I (iv) If at any time before such one of the three events mentioned in (ii) above as shall first happen the employee while still in the service of the company desires to sell the house, he may do so, but in that case he is only to be entitled to the benefit of the company’s guarantee against capital loss if he obtains the company’s consent to the sale and offers to sell the house to the company. If the company accepts the offer then the house is to be bought by the company on similar terms to those stated in (i) above (i.e., with the benefit of the guarantee). If the company declines the offer, then the employee may sell to whom he pleases and the company’s guarantee is to apply to any resulting capital loss (see cl. 4).

The agreement is to continue in force for a period expiring twelve calendar months after the death of the employee, but subject to fulfilment of accrued

rights it ceases automatically on such one of the following events as shall first happen, that is to say if the employee shall:—(a) Be transferred for service with the company elsewhere and offers to sell the house to the company. (b) Retire from the service of the company on pension. (c) Cease to be employed by the company for any other reason. (d) Sell or let the property or any part thereof. (e) Cease to use the house as a permanent residence (see cl. 11). It is a condition precedent to the company's affording to the employee a guarantee against any capital loss he may suffer that the employee shall at all times keep the house in good tenantable repair (see cl. 6).

Such being the nature of the housing agreement, were the payments made by the company to Mr. Mayes and Mr. Jennings respectively pursuant to the guarantee on their respectively being transferred and selling their houses for less than they had paid for them, after first duly offering them to the company, profits of their employment with the company? We were referred to most of the many authorities in which payments received by holders of offices or employments in an infinite variety of circumstances have been held to be or not to be profits of the office or employment for tax purposes. I do not propose to go into them at length. The general principles to be applied are well settled. The difficulty is to apply them to the facts of particular cases.

I am content to accept the broad proposition of counsel for the Crown that the profits of an office or employment include every sum in money or money's worth paid by an employer to an employee during his employment in his capacity as employee and for no consideration moving from the employee other than the services which he renders. I would, however, qualify that broad proposition by saying that it is not to be taken as extending to "testimonials" of the kind considered by the House of Lords in *Seymour v. Reed* (1) ((1927), 11 Tax Cas. 625), and also that there may be benefits casually bestowed by an employer on an employee such as birthday, Christmas, or wedding presents, or given on compassionate grounds referable to relationship, friendship, social custom, or motives of charity, which, though made for no consideration in the legal sense, should not be treated as referable to services, or as made to the employee in that capacity. But no exception of that kind arises here.

I am also content to accept the converse proposition that a payment made by an employer to an employee for a consideration other than services is not a profit of the employment, albeit made during the continuance of the employment. The decisive question in each of these two cases therefore is, as I see it, simply whether the payment made by the company to the taxpayers pursuant to the guarantee is a payment made to the employee in that capacity and for no consideration other than services, in which case it is taxable as a profit of his employment; or was such payment made for a consideration other than services, in which case it is not so taxable.

I think it may truly be said that the housing agreement in each case was entered into by the company with the taxpayer in his capacity as employee, in the sense that it was by virtue of his being an employee of the company that he was given the opportunity of participating in the housing scheme, and for that purpose of entering into the housing agreement with the company. But it does not necessarily follow that the taxpayer, having entered into the housing agreement and thereafter receiving a payment from the company under the guarantee, must be taken to have received that sum in his capacity as employee and for no consideration other than services.

The taxpayer was enabled to enter into the housing agreement by virtue of the fact that he was an employee of the company. But any payment he might receive under the housing agreement would be received by him because, being an employee of the company, he had entered into the housing agreement and had complied with all its terms and conditions. In order to participate in the housing scheme, an employee of the company, over and above answering that

- A description, and being married, had to comply with a number of conditions. In order to bring himself within the ambit of the scheme he had, of course, as an essential prerequisite, to buy a house, and find the purchase money for it either out of his own resources or by means of an ordinary mortgage supplemented by an interest-free loan granted by the company. It is, of course, true that an employee need not buy a house or enter the scheme unless he chose; but any employee buying a house and entering the scheme must, I think, be taken to have done so on the faith of the scheme. Apart from the scheme and the guarantee which it promised, he would in all probability not have ventured to buy a house owing to the risk of capital loss in the event of his having to sell, especially in the case of his being transferred. Then he had to enter into the housing agreement and comply with the conditions on which his right to the indemnity was by that agreement made to depend. In the forefront of those conditions is the positive obligation laid on him to offer the house for sale to the company in the event of his desiring to sell or let it by reason of transfer. This, as I understand it, is an obligation with which the employee is bound to comply in that event, and not merely a condition he must fulfil in order to claim the benefit of the guarantee. Moreover, it applies when the employee desires to let and not merely when he desires to sell. This, I think, is a restriction of substance. The employee might have perfectly good reasons for wishing to let rather than sell on being transferred. But the housing agreement precludes him from doing this without first offering the house for sale to the company.

- Then it is to be observed that the agreement makes it a condition precedent to any claim under the guarantee that the employee should keep the house in good tenantable repair. It is, of course, true that in spending money on repairs the employee would be maintaining the value of his own property. Nevertheless, this stipulation does impose as a condition of benefit an obligation not incumbent on a freeholder in the ordinary way. Then the provisions as to the termination of the housing agreement include as bringing about such termination the events of the employee letting the house or any part thereof or ceasing to use the house as a permanent residence. It appears to me that the condition against letting (and particularly against letting "any part" of the premises) might operate substantially to the detriment of the employee, as also might the condition against ceasing to use the house as a permanent residence (whatever the precise meaning of that expression may be). Then, in the event of the employee desiring to sell otherwise than on transfer or retirement (in which event, as in the case of a sale by the personal representatives of a deceased employee, the house is not apparently required to be offered for sale to the company), no claim can be made under the indemnity unless the company consents to the house being sold and the house is first offered for sale to the company.

- The rights of first refusal given to the company, particularly the positive obligation the employee is under to offer the house for sale to the company where an employee desires to sell or let on transfer, might well be advantageous to the company, notwithstanding its obligation under the guarantee, in the event of there being a shortage of suitable accommodation for their employees. One may take it, too, that the company regards it as expedient from a business point of view that employees should be encouraged to buy houses on the terms of the housing scheme and agreement, thus helping to ease the problem of staff housing.

- I The matter is put by counsel for the Crown as one of pure bounty on the part of the company referable to no consideration moving from the employee other than services. I cannot share this view. The balance of burden and benefit under the housing agreement must be regarded as at the date when it is entered into with any given employee. When it is entered into, no one can tell whether the house will rise or fall in value. If it rises in value or maintains its value, the employee gets no benefit apart from peace of mind. On the other hand, in order to be covered against a possibility of loss which has never materialised,

the employee will, it may well be to his detriment, have done or abstained from doing the things which under the housing agreement he is required to do or abstain from doing as a condition of benefit. The company on its part at least gets the advantage of the right of pre-emption in the event of the employee desiring to sell or let on transfer, which in the circumstances I postulate would entitle the company to buy simply at the current market value without any addition thereto for depreciation in value, since there would have been none. A B

In the event of the house depreciating in value, the employee does no doubt gain a substantial advantage, but not, as I think, by any means an advantage representing pure bounty on the part of the company referable to no consideration moving from the employee other than his services.

The transaction may be described as a form of insurance. It cannot bestow any profit on the employee, but merely protects him against loss. To segregate the benefit (in cases in which it materialises) from the burden, and to ignore the cost to the employee of obtaining it, in the shape of the purchase money he has laid out in the faith of the housing scheme and agreement, and lost through the depreciation in value of the house, ignoring also the other forms of consideration moving from the employee as above described, and thus to arrive at the conclusion that the sum paid by the company under the indemnity by way of recoupment for that loss is a profit of his employment, as being a sum received for no consideration other than services, appears to me to involve a considerable distortion of the facts. C D

Counsel for the Crown says (in effect) that this result must ensue because (a) the payment made by the company under the guarantee is a profit of the employee's employment taxable under Sch. E; (b) under r. 7 of the Rules applicable to Sch. E, the employee cannot deduct any expenses not wholly exclusively and necessarily incurred in the course of his employment; and (c) the expenditure incurred in the purchase of the house does not answer that description, inasmuch as the employee need not have purchased the house. He says further that, if the employee could deduct the amount of his loss on the house (as in fact he could not), tax would be exigible on the corresponding amount paid to him by the company under the guarantee. E F

I find it difficult to rid myself of the inclination to think that, if the house-purchase transaction is looked at as a whole, no profit arises from it to the employee, even in a case in which the guarantee becomes operative. If that were right then there would be an end of the matter. If it is wrong, and any sum paid under the guarantee is to be taken in isolation and looked on as profit, then the question remains whether it was paid by the company to the employee for no consideration other than services. If it is to be so looked on and was so paid, then I agree with counsel for the Crown that no deduction in respect of the employee's outlay on the house would be allowable. G

The whole case in a simplified form can be put thus. Suppose an employer makes a bargain with his employee to the effect that, if the employee buys a house in a given locality, keeps it in repair, refrains from letting it, uses it as a personal residence and undertakes to give the employer the first refusal of it in the event of his desiring to sell, the employer on his part will guarantee the receipt by the employee on any re-sale by him, whether to the employer or to some other purchaser, of a price equal to the current market value of the house or the amount he paid for it, whichever is the greater. Suppose further that the employee does buy a house and duly complies with all the employer's requirements and at some time thereafter, the stipulated offer to the employer having been made and refused, the employee sells the house to someone else at less than the price he paid, and the employer duly makes good the difference to the employee. In those circumstances, is the difference so made good to the employee, if a profit at all, a profit of his employment, as having been received by the employee in that capacity and for no consideration other than services? H I

- A Counsel for the Crown pointed out that the discharge by an employer of a liability incurred by his employee to a third party may to the extent of the liability thus discharged constitute a profit of the employee's employment. In support of that proposition, which I fully accept, he cited *Hartland v. Diggines* (2) ((1926), 10 Tax Cas. 247), where an employer paid his employee's income tax and this was held to constitute a profit of his employment. He also cited on the same point *Nicoll v. Austin* (3) ((1935), 19 Tax Cas. 531), where a managing director continued at the company's request to live in his own house, the company paying all outgoings, and these payments were held to be profits of his office. For the proposition that a single payment to an employee may be a profit of the employment (which again I fully accept) he cited *Weston v. Hearn* (4) ([1943] 2 All E.R. 421), where a lump sum paid to an employee on completing twenty-five years' service was held taxable. For the proposition that a benefit contingently receivable by an employee as a profit of his office or employment is to be treated for tax purposes as income of the year in which it is received, counsel for the Crown cited *Edwards v. Roberts* (5) ((1935), 19 Tax Cas. 618). I think that that must be so where no money value can be put on the benefit until it is actually realised. So here, if the payment under the guarantee is rightly to be treated as a profit of the employee's employment, it would seem that it must be treated as accruing on the date on which it became payable, inasmuch as it could not be quantified until the contingency of capital loss materialised.
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On the main issue in the case counsel for the Crown referred us to the line of cases headed by *Dewhurst v. Hunter* (6) ([1932] All E.R. Rep. 753), in which payments made by companies to directors have been considered. These cases no doubt bear out the broad general proposition attributed to counsel for the Crown earlier in this judgment, but they equally bear out the converse proposition that a payment made by an employer to an employee for a consideration other than services is not a profit of the employee's employment. For example, in *Dewhurst v. Hunter* (6) itself LORD ATKIN said (*ibid.*, at p. 761):

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- F "Rule 1 [of the Rules applicable to Sch. E] appears to me to indicate emoluments either received from the employer or from some third party . . . as a reward for services rendered in the course of the employment."

Again, in *Beak v. Robson* (7) ([1943] 1 All E.R. 46), VISCOUNT SIMON, L.C., said (*ibid.*, at p. 47):

- G "In the agreement before us, the obligations flowing from the contract of service and the remuneration to be received by the respondent in respect of that service are entirely separate from the restrictive covenant and the consideration which is given for it. The sum of £7,000 is not paid for anything done in performing the services in respect of which Robson is chargeable under Sch. E."
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We were also referred to the line of cases dealing with payments by third parties, headed by *Herbert v. McQuade* (8) ((1902), 4 Tax Cas. 489), of which the latest examples are *Moorhouse v. Dooland* (9) ([1955] 1 All E.R. 93) and *Bridges v. Hewitt* (10) ([1957] 2 All E.R. 281). This line of authority, besides affording ample recognition of the principle that, to be taxable under Sch. E, payments made to the holder of an office or employment must be by way of remuneration for his services (see in particular VISCOUNT CAVE, L.C., in *Seymour v. Reed* (1) 11 Tax Cas. at p. 646, a passage too well known to bear repetition), clearly establishes the proposition that the question whether a given payment is a profit of his office or employment must be viewed from the standpoint of the recipient. This proposition has its origin in the well-known passage from the judgment of SIR RICHARD HENN COLLINS, M.R., in *Herbert v. McQuade* (8), where he said (4 Tax Cas. at p. 500):

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"... the test is whether from the standpoint of the person who receives it, it accrues to him in virtue of his office . . ." A

The following passage from the judgment of STIRLING, L.J., in *Herbert v. McQuade* (8) (*ibid.*, at p. 501) seems to me to be much in point:

"... a profit accrues by reason of an office when it comes to the holder of the office as such—in that capacity—and without the fulfilment of any further or other condition on his part . . ." B

I do not see how the payments made by the company to the taxpayers, Mr. Mayes and Mr. Jennings, in the present appeals can be held to have satisfied either of these tests. As to the latter, the taxpayers here did have to fulfil further or other conditions. As to the former, I cannot conceive that either of the two taxpayers, regarding the matter from their own point of view as recipients of the payments, could possibly have looked on them as profits of their employment or, in other words, as remuneration accruing to them by reason of their employment by the company, as distinct from payments which, in the events which happened, they received from the company under and by virtue of the housing agreement. C

I derive assistance, too, from the following passages in *Beak v. Robson* (7) D and *Cowan v. Seymour* (11) ([1920] 1 K.B. 500). In *Beak v. Robson* (7) VISCOUNT SIMON, L.C., said ([1943] 1 All E.R. at p. 47):

"It is quite true that, if he had not entered into the agreement to serve as a director and manager, he would not have received £7,000. But that is not the same thing as saying that the £7,000 is profit from his office of director so as to attract tax under Sch. E." E

In *Cowan v. Seymour* (11) YOUNGER, L.J., said ([1920] 1 K.B. at p. 517):

"... their office or offices as such . . . may have been the *causa sine qua non*, but they were not the *causa causans*."

It may well be said here, I think, that, while the taxpayer's employment by the company was a *causa sine qua non* of his entering into the housing agreement and consequently in the events which happened receiving a payment from the company, the *causa causans* was the distinct contractual relationship subsisting between the company and the taxpayer under the housing agreement, coupled of course with the event of the house declining in value. F

Counsel for the Crown said (in effect) that a consideration other than services could only be shown if the consideration (other than services) moving from the employee for the benefit received demonstrably represented full value in money or money's worth for the benefit in question. I find no warrant in the authorities for this proposition. It would no doubt be right to disregard a fictitious or colourable bargain designed to disguise what was in fact remuneration as payable in some other account. But nothing of that sort enters into this case. The housing agreement constitutes a genuine bargain advantageous, no doubt, to the taxpayer, but also not without its advantages to the company, and I see no reason for disregarding it as the source of the payments sought to be taxed in these two appeals. G H

Counsel for the Crown said further that, if partial consideration in money or money's worth was shown, there should be an apportionment, and he instanced *Tilley v. Wales* (12) ([1943] 1 All E.R. 280). In that case, however, it was possible to apportion the sum received so as to ascertain how much of it was attributable to the director's agreement to a reduction of salary (which was taxable) and how much to commutation of pension (which was not). In the present case obviously there could be no apportionment. It must be all or nothing. I

For the reasons I have endeavoured to state, I do not think the sums received by the two taxpayers under their respective housing agreements were profits

A of their employment so as to be taxable under Sch. E, and accordingly in my view both appeals (which it is now agreed must stand or fall together) should be dismissed.

B **PARKER, L.J.:** This is not an easy case and it is with considerable diffidence that I have come to a different conclusion. I do not think that any useful purpose would be served by going through the authorities. Most of them are conveniently collected in the learned judge's judgment in the present case, and in the recent decision of this court in *Bridges v. Hewitt* (10) ([1957] 2 All E.R. 281). Though there appeared at one time to be an issue between the parties as to the true principle of law involved, I am satisfied that there is no real difference. The principle can, I think, be stated thus.

C Where you find that an employee has during the course of his employment received from his employer a benefit in money or money's worth, that receipt is a profit of his employment and taxable as such unless (i) it amounts to a gift to him in his personal capacity, e.g., a benefit conferred out of affection or pity; or (ii) it has been received for a consideration other than the giving of services. This can be put more shortly by saying that such a benefit, to be a profit of his employment, must have been received by him in his capacity of employee as a reward for services. In the two exceptions referred to above, though the benefits are received by him while he is an employee and might not have been received but for his being an employee, yet in his hands the benefit is not a reward for services.

E The real difficulty is as usual in the application of that principle to the facts of the case. I will deal first with what I have referred to as the first exception. It was argued—albeit faintly—that the indemnity when received whether in money or in account was in truth a mere compassionate allowance. It is enough to say that in my judgment that is an impossible argument on the facts found in these cases. The housing scheme formed part of the company's staff policy and the housing agreement was one open to any of a class of employees who wished to avail themselves of it.

F Whether, however, this can be said to be within the second exception is more difficult, and depends on a proper construction of the housing agreement. On behalf of the Crown it is contended that, looked at broadly, this agreement is wholly for the benefit of the taxpayer employee, and that the real or substantial consideration is services. For the taxpayers, on the other hand, it is said that on a proper analysis the housing agreement itself sets out a substantial consideration and that it would be wrong to look outside the contractual terms in that agreement (see *Inland Revenue Comrs. v. Duke of Westminster* (13), [1935] All E.R. Rep. 259). The housing agreement accordingly, it is said, is purely collateral to the service agreement.

H Now I take it to be the law that it is not enough to make an agreement collateral in this sense that there is sufficient consideration to support it. Otherwise an agreement to make a purely voluntary payment for services, e.g., in recognition of twenty-five years' service, would, if under seal, come within the exception. Nor do I think that it is enough to make the agreement collateral that some term is inserted which may be said to be of some advantage to the employer or cause some detriment to the employee. Thus agreements with employees living twenty miles from their place of work that employers would repay half the price of their season tickets could not be said to be collateral merely because the employees would have to buy season tickets as a condition of getting repayment. The question, I think, in every case is one of degree depending on whether the term can properly, in the surrounding circumstances when the agreement was made, be said to be merely a term of the receipt of additional benefit for the employee's services or can properly be said to amount in itself to the substantial consideration for the benefit in which case the consideration is other than for services. In approaching the matter in this way, I am not conscious

of taking a line in conflict with the *Duke of Westminster* case (13). I am merely A
construing the agreement in question in the light of the surrounding circumstances.

Now, while the housing agreement is not altogether easy to construe, I think
that the following can be clearly deduced from it. (i) It is no part of the con-
sideration that the employee agrees to be transferred. He has by his service B
agreement bound himself to go where he is sent and it is for him to get such
living accommodation as he can at his new place of work. (ii) If he desires to
sell the house, he will be entitled to any profit that is realised and he will be
indemnified against any loss. (iii) In certain events he has to give his employers
a first refusal to buy the house, but, if they buy, he is to get the current market
value. In assessing this any offers from prospective purchasers would no doubt
have to be taken into consideration. Accordingly, the employee can in no
event suffer a pecuniary loss and he gives up nothing of pecuniary value. He is C
merely in certain cases restricted in his choice of purchasers. (iv) Apart from
having to give a first refusal in certain events, the only possible detriment he
could be said to suffer was that he had to keep the property in good tenantable
repair, and that on transfer he is not allowed to let it. (v) While there is no
express finding to this effect, it is, I think, fair to assume that from time to time,
though not in these cases, the first refusal will turn out to be of benefit to the
employers in that it may enable them to offer the house to another employee. D
On the other hand it is clear, and there is an express finding to this effect, that
the real object of the agreement is to make the employee contented and free
from financial worry.

Bearing these considerations in mind, I find it quite impossible to arrive at any
conclusion other than that there is no substantial consideration apart from E
services. It would be quite unrealistic to say that the consideration for the
indemnity is the giving in certain events of a first refusal or the obligation to
keep in repair. Not only is the object of the agreement to improve the services
which the employee is giving, but in my judgment the indemnity is given in
consideration of those services just as if the service agreement had itself provided
that the remuneration was to include the benefits under any housing agreement. F
To look at the matter from another angle, if such an agreement had been entered
into by the company with a stranger, it could only be regarded as an instrument
of bounty.

Great reliance, however, was placed by the taxpayers on the express finding
that the salaries payable under the service agreement compared favourably
with those paid by other employers not operating a housing scheme. This, it G
was said, if not conclusive, was at any rate *prima facie* evidence that the con-
sideration under the housing agreement was for something other than services.
For my part I find it impossible to attach any weight to this finding or argument.
The salary which an employer is able to pay and pays depends on so many
factors. One employer may find himself in a position to pay and will pay more
than another and the fact that a good employer is already paying what is found
to be a full and adequate salary goes in my judgment nowhere towards showing
that some other benefit he is prepared to give is not in consideration of services. H

Finally, it was contended on behalf of the taxpayers that, even if the sums
were received as a reward for services, they were not the profits of employment.
The agreement, it was said, only protects the employee against loss—it does not
and cannot produce profit—and accordingly the sums received have none of the
attributes of income. I confess that I cannot fully understand this argument. I
If sums received pursuant to an undertaking to pay obligations incurred to third
parties are taxable (see *Hartland v. Diggins* (2) (1926), 10 Tax Cas. 247, and
Nicoll v. Austin (3) (1935), 19 Tax Cas. 531) I can see no reason why the present
sums received pursuant to an agreement by way of indemnity are not equally
taxable.

Accordingly, for myself, I would allow these appeals.

- A** **PEARCE, L.J.:** In these cases the difficulties come, not from any difference in opinion as to what are the principles applicable to them, but from a difference as to how those principles should be applied to the facts. The cases turn on the view that one takes of the housing agreement. The benefit under consideration is taxable as a profit of the employment only if it has been received by the employee in his capacity of an employee as a reward for services and not for some consideration other than the giving of services. **STIRLING, L.J.**, said in the well-known passage in *Herbert v. McQuade* (8) ((1902), 4 Tax Cas. 489 at p. 501):

“ . . . a profit accrues by reason of an office when it comes to the holder of the office as such—in that capacity—and without the fulfilment of any further or other condition on his part . . . ”

- C** I fully accept that the “ other condition on his part ”, the consideration moving from the employee, must be more than a technical consideration. It must not be a mere cloak to conceal any additional benefit given to the employee as such. It must in my view be such as to entitle both the consideration and the benefit obtained thereby to rank as a collateral transaction. The alleged collateral transaction need not be weighed in exact scales in order to see who benefits most by it. Such a task would be hard when on the one side you get a human who may be preoccupied with the price of a house and security against the risk of losing a comparatively small sum, and on the other side a limited company, with millions at its disposal, concerned to see that the human frictions do not clog the machinery of its vast enterprises. If, looking fairly at the agreement, one can say that this is a fair agreement (albeit generous to the employee in certain events) under which the company gets appreciable benefits (other than the mere benefit of giving a financial advantage to this particular employee and thereby making him a more contented worker) and that the employee gives a genuine and appreciable consideration, then there is enough to make it a collateral transaction. The question how onerous it is to him to give that consideration is a relevant matter but should not, I think, be by itself the deciding factor. When a man gives a consideration that costs him little but is important to a rich recipient, he may fairly receive for it a price that is handsome in some contingencies. Perhaps a convenient test might be this—is this a scheme that could commend itself on its merits to a director who thinks that the company’s employees are already adequately paid and does not intend to do anything for the mere purpose of giving them additional financial benefits?
- D**
- E**
- F**
- G**

The Crown contends that, under the housing agreement, the employee gets the reimbursement of loss on his house for no real consideration other than his services as an employee. If this is the true view, the sum in question is taxable.

- H** One cannot shut one’s eyes to the fact that every large company owning factories in different places and having to transfer staff from one to another for purposes of promotion, organisation or otherwise, is bound to have a serious concern for the housing of employees so transferred—a concern which could at times become acute. Is this housing agreement seriously intended to help with that housing problem as it affects the company? Or is it merely intended to help the individual employee financially? Or is it a genuine attempt to fulfil both these intentions on a fair and mutual basis?

- I** Under the scheme the employee is reimbursed in respect of loss but he does not make a profit in the normal sense. The first matter dealt with in the agreement is the moment when an employee is transferred. Under cl. 2, if an employee who has bought a house on the terms of the agreement is transferred and wishes to sell or let (one of which in the ordinary case he will do) the company is to have a thirty days’ option on the house to buy it at a valuation. That clause is definite in its terms and there is no relaxation of it as there is in respect of a clause dealing with other situations. Is it unfair to draw the inference from the agreement that this option is of importance to the company? That inference

accords with what one might expect as a matter of common sense. At the moment of transfer the company is concerned with the housing of a successor to the man transferred. Secure in the possession of an option, it can appoint a successor, having (and imparting to him) the knowledge that a house is available at a valuation which the company can either buy (if need be) or guide into the successor's possession under its option. Moreover, the option prevents the outgoing employee from being tempted to ask a fancy price from his successor. As other clauses provide for reimbursement of the owner for any loss, the agreement obviates the natural resentment that the owner would feel if compelled to sell to a rich company at what turns out to be a loss.

The employee is thus prevented from selling or letting his house on transfer before the company has had a thirty days' option to buy it. It is true that, if he wishes to keep on his house without selling or letting he may do so, for example, if he leaves his family behind him. But this seems a reasonable concession and I see no reason to suppose that in practice it would frequently arise or be used for any deliberate evasion of giving the option. Clause 3 deals with the situation if the option is refused or the employee retires on pension or dies. Presumably it is because of not unreasonable social considerations that there is no provision by which the company can turn out a widow or pensioner. Many men would not enter schemes under which their widows could be evicted on their deaths or they themselves could be evicted on retirement. If any of the three events happen and within twelve months the house is sold at a loss, the company makes good the loss. If it is not sold within twelve months and a valuation shows it to be worth less than it cost the employee (plus improvements) the difference is paid by the company to the employee or his representatives. Clause 4 deals with the situation where an employee before a transfer wishes to sell. If he wishes for reimbursement of loss, he must obtain the company's consent and give the company a thirty days' option to buy it at valuation. Clause 7 makes it clear that in respect of cl. 4 (i.e., the time before transfer) the owner is always free to sell at a profit. The fact that cl. 7 gives him no such freedom under cl. 2 in respect of the moment of transfer would seem deliberate. The period when a man is still working where his house is and he has not been transferred could hardly create any housing problem. If a man sells his home in a place where he is still employed, he presumably does so because he knows that he can rehouse himself. At all events, he cannot thereafter blame the company if he is then houseless. It must be remembered that, by reason of the agreement, the company is probably in touch with the situation regarding the particular house and is quite entitled to make any offers for it. Under cl. 6 the employee has to keep the house in good and tenantable repair as a condition precedent to any reimbursement of loss.

In my view the company gets a definite benefit from the scheme in its general problem of housing staff as well as in its particular solicitude for the welfare of the individual employee, since it entitles it as a rule to a house for his successor. The employee does various things which are a real consideration. He has to find a house within reach of the factory, and embark on the venture of buying it, probably entering into a first mortgage and probably producing some money of his own. He must keep the house in good condition. Before he can get any reimbursement he must suffer loss on resale. In many cases this will never arise; but in any event he has to give the company an option to buy it at a valuation on transfer and thereby loses his opportunity of asking possibly an enhanced or fancy purchase price or rent from his successor, who might (if unsure of any housing on transfer) be prepared to pay it.

Any assumptions that I have made are, I think, natural inferences that should be drawn from the agreement and are confirmed by the important surrounding circumstance that it is an agreement with a member of the staff made by a large company which has to transfer its employees to various parts of the country.

A Paragraph 3 (g) of the Case Stated with regard to Mr. Mayes is not, I think, inconsistent with these inferences. That reads:

B “I.C.I. have to move a great number of their staff from one part of the country to another. The company recognises that the transfer of a married man involves him in domestic upheaval. Although a man might be willing to buy a house in the new location, his chief worry was the loss he might make if he had to sell the house. I.C.I. try to operate a staff policy which results in a contented staff. Unless the staff are contented they do not do their best work. I.C.I., therefore introduced the housing scheme so that they should have employees whose minds were eased to some extent of the worry of possible financial embarrassment in the future arising out of the removal occasioned by the company’s action.”

C The words “might be willing to buy a house” seem to indicate that the company, as one would suppose, wishes to promote the owning of homes by its employees (no doubt for the company’s ultimate benefit) and to remove the formidable deterrents that buying and owning a possibly transient home present to the man without capital resources. It is true that overall the employee gets an advantage

D in many cases, but I think that this is a careful scheme with some gains and concessions on both sides. It is designed on terms very generous to the employee in certain events but not in my view to an extent that robs it of real mutuality.

E The employment was a *causa sine qua non* of the benefit, but it was not the *causa causans*. Here there was no one *causa causans*. The benefit was produced by the joint effect of the employment, the finding and purchase of the house, the making of the housing agreement, the transfer of the employee and the loss of value in the house whereby the benefit became payable under the terms of that agreement. I agree with the view expressed by the learned judge when he says ([1958] 1 All E.R. at p. 378):

F “It was in no true sense a reward for his services. It was an advantage to him but not in my judgment a profit. It was something which was wholly collateral and really had nothing to do with the office or the services which he was bound to render to his employers.”

I would dismiss these appeals.

G *Appeals dismissed. Leave to appeal to the House of Lords granted on terms that the Crown would not seek to disturb the orders for costs in the Court of Appeal and below.*

Solicitors: *Solicitor of Inland Revenue; J. W. Ridsdale*, solicitor to Imperial Chemical Industries, Ltd. (for the taxpayers).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

SURUJPAUL called Dick v. RÉGINAM.

[PRIVY COUNCIL (Lord Tucker, Lord Somervell of Harrow and Lord Denning),
July 22, 23, 24, October 2, 1958.]

Privy Council—British Guiana—Criminal law—Accessory before the fact—One accused found guilty as accessory before the fact, but all accused acquitted as principals—Whether conviction of the one sustainable—Criminal Law (Offences) Ordinance (Laws of British Guiana, 1957, c. 10), s. 24, s. 25.

The appellant, together with four others, was charged in one count with the murder of A. One accused was acquitted at the close of the case for the prosecution. Owing to uncertainty who were present at the time when A. was killed, the jury were asked with regard to each of the other accused whether they found him guilty or not guilty of being an accessory before the fact to murder or guilty or not guilty as principal. All accused were acquitted save the appellant, who was found guilty of being an accessory before the fact to the murder of A., but was found not guilty as principal. The appellant had made a statement to the police in which he had said that two of the accused, other than himself, had shot A.

Held: the conviction of the appellant of being an accessory before the fact to murder must be quashed because it was inconsistent with the acquittals of all accused of murder, there being no sufficient evidence to have enabled the jury to have concluded as against the appellant that one or more of the accused had committed the murder.

R. v. Hughes ((1860), Bell, C.C. 242) and *R. v. Rowley* ([1948] 1 All E.R. 570) considered.

Appeal allowed.

[**Editorial Note.** Section 24 and s. 25 of the British Guiana Criminal Law (Offences) Ordinance are in similar terms to the Accessories and Abettors Act, 1861, s. 1 and s. 2, for which, see 5 HALSBURY'S STATUTES (2nd Edn.) 724.

As to the indictment of an accessory before the fact, see 10 HALSBURY'S LAWS (3rd Edn.) 304, para. 564; and for cases on accessories before the fact, see 14 DIGEST (Repl.) 105-109, 684-746.]

Cases referred to:

- (1) *R. v. Hughes*, (1860), Bell, C.C. 242; 29 L.J.M.C. 71; 1 L.T. 450; 24 J.P. 101; 14 Digest (Repl.) 108, 726.
- (2) *R. v. Rowley*, [1948] 1 All E.R. 570; 112 J.P. 207; 32 Cr. App. Rep. 147; 14 Digest (Repl.) 112, 775.

Appeal.

Appeal in forma pauperis by special leave by Surujpaul called Dick against a judgment of the Court of Criminal Appeal of British Guiana (STOBY, Ag. C.J., LUCKHOOD and DATE, JJ.), dated Jan. 8, 1958, dismissing the appellant's appeal from his conviction on July 29, 1957, at the Criminal Assizes for the County of Berbice in British Guiana before PHILLIPS, J., sitting with a jury, of being an accessory before the fact to the murder of Claude Allen, a police constable, on Mar. 9, 1957. The appellant was sentenced to death. The facts appear in the judgment of the Board.

W. P. Grieve for the appellant.

J. G. Le Quesne for the Crown.

LORD TUCKER: The appellant was convicted at the criminal assizes for the County of Berbice in British Guiana on July 29, 1957, of being an accessory before the fact to the murder of Claude Allen and was sentenced to death. His appeal to the Court of Criminal Appeal of British Guiana was dismissed on Jan. 8, 1958. He appealed in forma pauperis by special leave to Her Majesty in Council, and this appeal was heard by the Board on July 22, 23, 24, 1958.

- A The appellant was charged with four other men in one count with the murder of Claude Allen on Mar. 9, 1957. The other four men will be referred to as accused Nos. 2, 3, 4 and 5. At the end of the case for the prosecution, accused No. 2 was, on the direction of the trial judge, acquitted by the jury. Owing to uncertainty as to which, if any, of the remaining accused was actually present and taking part in the murder and which, if any, might have been accessories
- B before the fact, the jury were quite properly asked with regard to each accused whether they found him guilty or not guilty of being accessory before the fact to murder, and whether they found him guilty or not guilty as principal. They found the accused guilty as an accessory before the fact to murder and not guilty as principal, accused Nos. 3, 4 and 5 they found not guilty as accessories and not guilty as principals. The appellant contended that these verdicts were
- C contradictory and inconsistent and, accordingly, his conviction should be quashed. The Court of Criminal Appeal rejected this contention on the ground that the jury must have come to the conclusion on the evidence legally admissible against the appellant that he was accessory before the fact to murder committed by the other accused, although they were not satisfied on the evidence legally admissible against each of the other accused considered separately that the
- D Crown had discharged the burden of proving the guilt of any one of them.

Section 24 and s. 25 of the Criminal Law (Offences) Ordinance, c. 10 of the Laws of British Guiana, are as follows:

E “ 24. Everyone who becomes an accessory before the fact to any felony, whether it is a felony at common law or by virtue of any statute for the time being in force, may be indicted, tried, convicted, and punished in all respects as if he were a principal felon.

F “ 25. Everyone who counsels, procures, or commands any other person to commit any felony, whether it is a felony at common law or by virtue of any statute for the time being in force, shall be guilty of felony, and may be indicted and convicted, either as an accessory before the fact to the principal felony together with the principal felon, or after the conviction of the principal felon, or may be indicted and convicted of a substantive felony, whether the principal felon has or has not been previously convicted, or is or is not amenable to justice, and may thereupon be punished in the same manner as any accessory before the fact to the same felony, if convicted as an accessory, may be punished.”

- G These sections are for all practical purposes identical with s. 1 and s. 2 of the English Accessories and Abettors Act, 1861, which in their turn had previously appeared respectively in the Acts of 1848* and 1826†.

It may be convenient at this stage to refer to a passage in RUSSELL ON CRIME (11th Edn.), Vol. 1, at pp. 134 and 135 which shortly and accurately states the nature of this crime. It is as follows:

- H “ A simple but important point is sometimes overlooked, namely, that when the law relating to principals and accessories as such is under consideration there is only one crime, although there may be more than one person criminally liable in respect of it; if there are more than one person, then the question arises as to the category in which each one is to be placed, that is, whether he is accessory before the fact, or principal in the first or
- I second degree or an accessory after the fact. There is one crime, and that it has been committed must be established before there can be any question of criminal guilt of participation in it. It is true that one who procures, advises, solicits or instigates in any way another person to commit a crime is himself guilty of the common law misdemeanour of incitement whether or not the offence solicited is carried out; but incitement is a different offence from

* See the Criminal Procedure Act, 1848, s. 1 (repealed).

† See the Criminal Law Act, 1826, s. 9 (repealed).

the one which is solicited; if and when the latter offence is committed then, and not until then, the inciter becomes a party to it, and if it be a felony, he is classed as an accessory before the fact, the fact being the crime which the incited person, has, in the character of principal in the first degree, carried out.” A

In the present case, it was essential to the conviction of any one of the accused as accessory before the fact for the Crown to prove that he had counselled, procured or commanded one or more of the other accused persons to murder Claude Allen, and that such person or persons had in fact murdered the said Allen. By their verdict, the jury have found that murder by any one of the accused has not been proved, but that none the less the appellant was guilty of having counselled one or more of them to commit murder and that one or more of them, unspecified, in fact committed it. This certainly appears, at first sight at any rate, an inconsistent and contradictory verdict. B C

In the course of the argument, their Lordships were referred to several authorities, some dealing with the law as to conspiracy, which was said to be analogous for present purposes, and to the history and origins of the law with regard to principals and accessories, but it is sufficient to refer to the only two cases which really throw much light on the present question. D

The first is *R. v. Hughes* (1) ((1860), Bell, C.C. 242). This was a case reserved by the Recorder of Manchester for the opinion of the Court of Queen's Bench. The prisoner Hughes had been charged together with one Hall in the first two counts of the indictment with larceny and in the third count alone with receiving. Both prisoners pleaded not guilty and were put in charge of the jury, whereupon counsel for the prosecution intimated that he did not propose to offer any evidence against Hall and applied that he should be acquitted in order that he might be called as a witness for the prosecution against Hughes. The recorder acceded to this request and Hall was acquitted. He was called as a witness and testified that he had stolen the goods in question and sold or given them to Hughes. The jury returned a general verdict of guilty against Hughes. The question reserved for the court was (*ibid.*, at p. 245): E F

“Whether, as the facts showed that Hughes, if guilty at all of the larceny, was guilty only as an accessory before the fact, and Hall, the principal, having been acquitted, I ought not to have told the jury that Hughes was entitled to his acquittal on the counts for larceny, and that they were to confine their attention to the count for receiving only.” G

The judgment of the court was delivered by ERLE, C.J. He said (*ibid.*, at p. 248) that the Criminal Procedure Act, 1848, s. 1, had made the crime of being an accessory a substantive felony, and that the old law which made the conviction of the principal felon a condition precedent to the conviction of the accessory had been done away with. He added that the accessory, “*whether he is tried before or at the same time as the principal . . . may be found guilty*”, although the principal H had been acquitted. In the report of this case in 1 L.T. 450 at p. 452, instead of the words italicised above the sentence reads:

“Whether the principal be tried before or at some time after the accessory before the fact, still there may be guilt in the accessory.”

The variation is, perhaps, of little importance since, in the case with which the court was dealing, the principal had been acquitted on the same indictment and by the same jury, albeit the acquittal of the principal was reached in the absence of any evidence of the commission of the felony, whereas there was ample evidence of such commission in the evidence adduced on the trial of Hughes. I

The second and more recent case is *R. v. Rowley* (2) ([1948] 1 All E.R. 570). In this case, the appellant had been charged at Birmingham City Quarter Sessions in one count together with two other men with breaking and entering and stealing, and in a second count together with the other two with receiving. In a further

A count the appellant was charged alone as an accessory after the fact to the felonious receiving by the other two. At the trial, the appellant's plea on this last count was taken first. He pleaded guilty and was sentenced. The trial of the other two men proceeded and they were acquitted on all counts. On appeal to the Court of Criminal Appeal (LORD GODDARD, C.J., HUMPHREYS and SINGLETON, JJ.), counsel for the Crown conceded that the procedure adopted B had been quite irregular. HUMPHREYS, J., in delivering the judgment of the court quashing the conviction said (*ibid.*, at p. 571):

C “As a result, there is error on the record which cannot be cured by amendment. Writs of error are abolished and have been abolished since 1908 by the Criminal Appeal Act, 1907, but this court has the power which the Court of King's Bench used to exercise in dealing with error on the record. Where there are no means of amending the record so as to make it consonant with the proved facts of the case and where it is inconsistent with itself, as the record is here, the only course this court can take is to quash the conviction . . .”

D The judgment then proceeded to comment on the undesirability of the course which had been adopted at the trial of taking the plea of the accessory before the trial of the principal felons.

E It is to be observed that *R. v. Hughes* (1) was not cited to the court, and it is true that counsel for the Crown did not seek to support the conviction. None the less, whatever the true view may be with regard to the technicalities, the course which had been adopted by the Recorder of Manchester in the last-mentioned case would now be regarded with even greater disapproval than that of the assistant recorder of Birmingham in *R. v. Rowley* (2).

F Their Lordships do not consider it necessary in this case to decide whether writ of error would have lain by reason of error on the record which could not be cured by reference to the evidence. They are content to deal with the case on the basis on which counsel for the Crown sought to uphold the conviction, G namely, by looking at the evidence to see if the inconsistency on the record is real or only apparent. The case for the Crown was that the accused men had engaged in a plot to rob the overseer of an estate of the wages of the estate workers, and that, on Mar. 9, 1957, Walter Cameron, the overseer, was in a land rover driven by a man named Ashroof together with a police escort, Claude Allen, near a place called New Dam, when two of the accused wearing masks and armed with a stick and a double barrelled shotgun held them up. Cameron threw the wages to the man with a stick, a shot from the rear of the vehicle was fired and Allen was wounded. Five masked men were seen running away, and Allen died later in the day.

H The case for the prosecution rested largely on the evidence of a man named Dhajoo, whom the jury were rightly told to treat as an accomplice. His evidence went to prove the existence of a plot by the accused to rob the payroll and to make use of masks and to hide guns in preparation for the robbery. If believed, there could be little doubt of the existence of the plot, and there was material in all the circumstances from which they might have drawn the inference that the plan was carried out by all or some of the accused and that, in the course thereof, the murder was committed. But the jury, whatever they may have thought I with regard to the evidence of the plot, evidently did not consider it sufficient to warrant the conviction of any of the accused as a principal. But it is said on behalf of the Crown that, as against the appellant, they may have found something in his statement to the police which would amount, with Dhajoo's evidence, to sufficient evidence and admissible against him that the crime was committed by one or more of those who had been “counselled or procured” by the appellant so to do. This necessitates a close examination of the statement, but it may here be observed that, although such statement may afford very strong corroboration of Dhajoo's evidence with regard to the part taken by the appellant in the plot

and as to his counselling or inciting the others to commit robbery or murder, it is difficult to see how it can afford any evidence as to the actual commission of the crime at which, by their verdict, the jury have found he was not proved to have been present and assisting. A voluntary statement made by an accused person is admissible as a "confession". He can confess as to his own acts, knowledge or intentions, but he cannot "confess" as to the acts of other persons which he has not seen and of which he can only have knowledge by hearsay. A failure by the prosecution to prove an essential element in the offence cannot be cured by an "admission" of this nature.

The passage in the statement of the appellant relied on by the Crown is as follows:

"When Chandee [No. 2 accused] came back Sunday morning 10.3.57 about five o'clock, he and Jagolall [No. 5] begin to gaff, and Jagolall ask Chandee why he shoot the man, and Chandee say when I say stick it up the man put he hand pon the revolver foh draw am out, and then Chandee and Battle Boy [No. 4] shoot am."

A statement of this nature cannot, in their Lordships' opinion, be regarded as equivalent to evidence by witnesses of the acts spoken to in this conversation and as sufficient to warrant as against the appellant a finding that Chandee (No. 2), and/or Battle Boy (No. 4), both of whom the jury acquitted, in fact committed the murder.

Their Lordships find it difficult to believe that, in any event, the jury applied this process of reasoning in arriving at their verdict. They consider it much more likely that the jury failed to appreciate the distinction between incitement to murder or conspiracy and being an accessory before the fact, and that the passage in the trial judge's summing-up dealing with the appellant's case may have contributed to this result. He said:

"If you feel sure that the evidence does not prove that he was there on the dam, but that he conspired with others to rob this payroll money and to commit this crime of robbery with violence with loaded guns, then you may convict him of the offence of being an accessory before the fact to murder."

In so saying, their Lordships do not desire to be unduly critical of the learned trial judge's summing-up taken as a whole. This was a most difficult and troublesome case to deal with and was not made easier for judge or jury by the numerous objections which were taken at various stages, none of which is now relied on.

Whatever may have actuated the jury in coming to these inconsistent verdicts, their Lordships are satisfied on an examination of the evidence that there was no distinction with regard to the evidence relating to the commission of the substantive offence as between the appellant and the other accused which could justify the result arrived at.

Their Lordships have, accordingly, humbly advised Her Majesty that this appeal be allowed, the verdict against and sentence on the appellant be quashed and a verdict of not guilty entered.

Appeal allowed.

Solicitors: *Lawrence Jones & Co.* (for the appellant); *Charles Russell & Co.* (for the Crown).

[Reported by G. A. KIDNER, ESQ., Barrister-at-Law.]

WOODLEY v. TERSONS, LTD.

[QUEEN'S BENCH DIVISION (Devlin, J.), July 24, 1958.]

Practice—Payment out of court—Fatal accident—Widow and infant daughter's damages paid into court—Payment out to bank trustees on trusts of a deed containing wide investment clause—R.S.C., Ord. 22, r. 14 (2).

Where damages are recovered by a widow under the Fatal Accidents Acts the court may, instead of itself administering the money, order the money to be paid out to trustees to be administered by them for the benefit of the widow and the other successful claimants under the Acts on the terms of an approved trust deed.

Application.

On June 25, 1958, in an action by the plaintiff, Florence Maud Woodley, suing as the widow and administratrix of the estate of Leonard James Woodley, the deceased, for damages under the Law Reform (Miscellaneous Provisions) Act, 1934, and the Fatal Accidents Acts, 1846 to 1908, in respect of the deceased's death, the plaintiff was awarded damages totalling £4,000 against the defendants, Tersons, Ltd., the deceased's employers; the claim under the Fatal Accidents Acts was brought on behalf of the plaintiff and the deceased's infant daughter. On June 27, 1958, the trial judge, DEVLIN, J., directed that £300 should be apportioned to the claim under the Act of 1934 and should be paid out to the plaintiff's solicitors, and that the balance of the damages, £3,700, should be apportioned to the claim under the Fatal Accidents Acts, as to £3,200 to the plaintiff and as to £500 to the infant daughter, and should be placed on deposit in court pending further order. The judge further directed that on the court's approving a trust instrument, to be drawn up, which was to provide for investment in investment trust units as well as in trustee securities, the £3,700 should be transferred to trustees on the terms of the instrument instead of being administered by the court*. Accordingly, a draft trust deed was prepared for the approval of the court.

The draft deed was stated to be made between the plaintiff (referred to hereinafter as "the settlor") and Hoare Trustees (referred to hereinafter as "the bank") and provided that (1) the bank should stand possessed of the sum of £3,700 and accrued interest thereon (the trust fund) on the following trusts:—

(a) That the sum of £500 and the accrued interest thereon should be appropriated out of the trust fund and invested by the bank for the benefit of the settlor's daughter and should be paid to the daughter on her attaining the age of twenty-one years, the bank to have power in its absolute discretion to release the whole or any part of the capital if required for the benefit of the daughter during her minority. The bank should pay the income arising from the £500 and the interest, if any, to or for the benefit of the daughter during her minority, and in the event of the daughter dying before she attained twenty-one years, the £500 should revert into the trust. (b) That the bank should pay the income of the remainder of the trust fund to the settlor during her life by monthly instalments and provide her with tax deduction certificates at the end of each tax year. (c) That after the settlor's death, the bank should stand possessed of the capital and income of the remainder of the trust fund on trust for the benefit of such persons as the settlor should by deed revocable or irrevocable or by will or codicil appoint and in default of and subject to any such appointment on trust for the settlor's daughter absolutely. (2) The bank in its absolute discretion should have power at any time to resort to any part or the whole of the trust fund for the benefit of the settlor for any purpose during her life. (3) The bank in its absolute discretion should have power to apply capital money for the purchase of an annuity for the settlor's benefit on her attaining the age of sixty-five. (4) The bank should have

* The court's powers of investment of funds which are being administered by it are set out in R.S.C., Ord. 22, r. 17.

power to invest trust moneys in or on such stocks, funds, shares, securities, mortgages, loans or other investments of whatsoever nature and whether of a kind authorised for investment of trust moneys or not as the bank in its absolute discretion should approve in all respects as if the bank were absolutely entitled to the moneys and should have power to apply the moneys in purchasing and maintaining life insurance policies and in investing in the purchase of property in Great Britain or elsewhere (including leaseholds for any term of years), such property to be held on trust for sale with power to postpone sale for any period that the bank should think fit. (5) The bank as trustee should act by its proper officers and have power to employ a solicitor, broker, banker or other agent to transact all or any business required to be done in relation to the trust. In addition to all charges and expenses incurred in connexion with the employment of such agent, the bank should be entitled to retain out of the trust fund or the income thereof the charges made by the bank for acting as trustee on the scale applicable under the bank's regulations. (6) In no event should the bank be liable to any person for the manner in which any discretion vested in them was exercised or for any loss or damage accruing to the trust fund other than loss or damage due to wilful wrongdoing. (7) The power of appointing new trustees should be vested in the bank.

J. Sofer for the plaintiff.

P. H. Ripman for the defendant.

J. Sofer: The plaintiff, subject to your Lordship's consent, wishes to have the money paid out to Hoares Bank trustee department. The advantage of having a trustee department of a bank handling the money would be that they would have very wide powers of investment, and there has been prepared for your Lordship's consideration a trust deed which gives the bank these very wide powers of investment, both in gilt-edged securities and equities and in investment trusts. I invite your Lordship to make an order that the £3,700 be paid to Hoares Bank trustee department to be administered on the trusts set out in the instrument which is before your Lordship.

DEVLIN, J.: I have read the trust deed. It seems to be perfectly simple in form, and the real object of it is to give a wider latitude in investment than the court has at present. The plaintiff should understand, however, that in exchange for the wide latitude in investment, which she may well consider under present conditions to be of benefit, she is not getting the free administration which the court could provide. If the plaintiff realises that, and desires it, I am perfectly satisfied and will sanction payment-out in the way that she desires.

Order accordingly.

Solicitors: *Matthew Morris* (for the plaintiff); *Mackrell & Co.* (for the defendant).

[Reported by *WENDY SHOCKETT*, Barrister-at-Law.]

TEASDALE v. WALKER.

[COURT OF APPEAL (Jenkins, Parker and Pearce, L.J.J.), July 21, 22, 30, 1958.]

Landlord and Tenant—New tenancy—Business premises—Occupation of premises—Seasonal business active only in holiday seasons, inactive in winter—Agreement by tenant to employ a manager for a year—Manager to have full control of business and all profits in return for agreed sum—Keys of premises returned to tenant at end of summer season—Agreement a sham as regards employment of manager—Whether premises occupied by tenant for the purposes of a business during next winter—Landlord and Tenant Act, 1954 (2 & 3 Eliz. 2 c. 56), s. 23 (1), s. 25 (1).

By a written agreement dated May 10, 1955, a landlord let a lock-up seaside shop to a tenant for one year from Mar. 2, 1955, and the tenant agreed not to assign, underlet, or part with possession of the demised premises or any part thereof. The tenant used the shop for mock auctions, and opened it only during the seaside holiday season, viz., for a week at Easter and Whitsun and during July, August and September. In 1955 and 1956 the tenant employed auctioneers who received either a wage or a commission and percentage of the profits, and the profits were paid to the tenant. In April, 1957, the tenant had to leave the neighbourhood and entered into a written agreement with one G., whereby she agreed to employ G. as manager of the shop for one year at a salary consisting of the whole of the business profits except £750 and to give G. full liberty to conduct the business in whatever manner he considered fit. G. agreed to pay the tenant £750 on the signing of the agreement, and to pay for all goods supplied to and discharge all the liabilities of the business, including the rent and rates, for the year. G. returned the keys of the shop to the tenant in the autumn of 1957, after the end of the holiday season. On Aug. 27, 1957, the landlord gave the tenant notice under s. 25 of the Landlord and Tenant Act, 1954, to determine the tenancy on Mar. 2, 1958. On Sept. 20, 1957, the tenant gave the landlord notice of her unwillingness to give up possession, and on Dec. 17, 1957, she applied for a new lease under s. 24 (1) of the Act. In opposition to the tenant's application for a new lease the landlord contended, inter alia, that the shop was not "occupied by the tenant . . . for the purposes of a business carried on by" her within the meaning of s. 23 (1)* of the Act, and that accordingly she had no right to apply for a new tenancy under s. 24 (1).*

Held: the tenant was not entitled to apply for a new tenancy under s. 24 (1) of the Landlord and Tenant Act, 1954, because—

(i) her agreement with G., in so far as it alleged that she was G.'s employer and he was her manager, was a sham, and during G.'s occupation of the premises she did not occupy them for the purpose of any business, and thus the tenancy was not then within s. 23 (1) and Part 2 of the Act of 1954 (ss. 23-46) did not apply to it.

Pegler v. Craven ([1952] 1 All E.R. 685) applied.

(ii) where the tenant's business is seasonal the question whether the tenant is in occupation of the premises for the purposes of the business throughout a year is one of degree and fact, and winter occupation may be inferred from continuity of successive summer occupations (see p. 315, letter C, post); but on the facts in the present case the continuity of the tenant's occupation was broken by G.'s occupation and she had not been in occupation of the premises for business purposes at the date of her application under s. 24 (1) or at the time of the hearing of the application or at the date of expiry of the landlord's notice under s. 25.

* The terms of s. 23 (1) and s. 24 (1) of the Landlord and Tenant Act, 1954, are printed at p. 310, letters D and E, post.

Per CURIAM: section 25 (1) of the Landlord and Tenant Act, 1954, had no such provision as had s. 24 (3) (b) to prevent notice to terminate a tenancy under s. 25 (1) being affected by the fact that the tenancy subsequently became one to which the Act applied; if, therefore, after G.'s occupation had ended the tenant had resumed occupation for business purposes, she would have become entitled to apply for a new tenancy (see p. 315, letter A, post).

Appeal allowed.

[**Editorial Note.** During G.'s occupation the landlord could, it seems, have served the shorter notice contemplated by s. 24 (3) (a) of the Landlord and Tenant Act, 1954, and this course would have avoided any question of the tenant's resumption of occupation for business purposes (see p. 311, letter H, and p. 314, letter I, post).

As to the tenancies to which Part 2 of the Landlord and Tenant Act, 1954, applies, see 23 HALSBURY'S LAWS (3rd Edn.) 885, para. 1707.

For the Landlord and Tenant Act, 1954, s. 23 (1), (3), s. 24 (1), (3), s. 25 (1), and s. 69 (1), see 34 HALSBURY'S STATUTES (2nd Edn.) 408, 409, 410, 443.]

Cases referred to:

(1) *Bagettes, Ltd. v. G.P. Estates Co., Ltd.*, [1956] 1 All E.R. 729; [1956] Ch. 290; 3rd Digest Supp.

(2) *Bobbio v. Watney, Combe, & Reid*, (July 13, 1955), C.A., unreported.

(3) *Pegler v. Craven*, [1952] 1 All E.R. 685; [1952] 2 Q.B. 69; 3rd Digest Supp.

Appeal.

The landlord appealed from the decision of His Honour JUDGE SHOVE, given at Lincoln County Court on Mar. 11, 1958, allowing an application by the tenant for a new tenancy of a shop. The facts, which are summarised in the headnote, appear in full in the judgment of PEARCE, L.J.

Paul Curtis-Bennett for the landlord.

E. A. Bramall for the tenant.

Cur. adv. vult.

July 30. **JENKINS, L.J.:** The judgment about to be read by PEARCE, L.J., is the judgment of the court.

PEARCE, L.J., read the following judgment: This is an appeal from His Honour JUDGE SHOVE given at the Lincoln County Court on Mar. 11, 1958, after a hearing at the Skegness and Spilsby County Court on Feb. 21, 1958. On an application by the tenant under the Landlord and Tenant Act, 1954, the judge ordered that she be granted a new tenancy of a lock-up shop at 89, Lumley Road, Skegness, for a period of two years at a rent of £420 per annum. The landlord, who was the respondent to the application, now appeals.

The material facts, about which there is no dispute, are these. The appellant landlord is owner of the premises. By a written agreement of May 10, 1955, the then owner (who was the present landlord's wife and who has since died) let the premises to the respondent tenant. By cl. 1:

"The landlord lets and the tenant takes all that lock-up shop and cellar beneath situate on the ground floor of the premises known as 'The Windsor Grill' No. 89 Lumley Road, Skegness in the County of Lincoln and together with the right for the tenant at her own expense to erect a rostrum inside the said demised premises for the purpose of auctioning articles in connexion with the business of the tenant . . . to hold the same unto the tenant from Mar. 2, 1955 for one year paying therefor the yearly rent of £400 by two equal instalments on June 7, 1955, and Aug. 2, 1955."

By cl. 2 (4) the tenant agreed not to assign, underlet or part with the possession of the demised premises or any part thereof. The premises were used for

- A "mock auctions". A so-called auctioneer, without holding a regular auction or receiving bids in the normal sense, collects a crowd about his rostrum and manages by amusing patter and skilful salesmanship to sell the articles of his stock to the various members of the crowd at prices which he induces them to believe are very cheap. These premises are near the sea front. Their use, being dependent on holiday crowds, is limited to certain seasons. They are only wont to open for about fifteen weeks in a year, namely, a week at Easter, a week at Whitsun and the three months of July, August and September. For the remainder of the year they are unused.

Before 1955 a Mr. Arnold had for some time been tenant of these premises and conducted mock auctions there on his own account. In 1955 the respondent tenant provided money for the business, Mr. Arnold gave up his tenancy and she entered into the tenancy agreement of May 10 for one year. She carried on the business there during the summers of 1955 and 1956. In 1955 the auctions were conducted by Mr. Arnold, who received a wage, and a Mr. Freedman, who received a commission and percentage on profits. The resulting profits were paid to the tenant. In 1956 she employed a Mr. Davis to act as auctioneer. He was paid on the same basis as Mr. Freedman had been. Again the profits were paid to the tenant. In 1957, however, a change of procedure took place. Owing to the illness of her mother the tenant had to go to live in Derby. She therefore entered into a written agreement with Mr. Glassman by which he became entitled to occupy the premises and to conduct the mock auctions on his own account on payment to her of a sum of £750 for the year. The agreement in its material parts runs as follows:

- E "This agreement is made the (blank) day of April, 1957, between Gladys Teasdale (widow) (hereinafter called 'the employer') of the one part and Nathan Glassman (hereinafter called 'the manager') of the other part whereby it is agreed as follows:—(1) The employer shall employ the manager as manager of her shop at 89, Lumley Road, Skegness, in the County of Lincolnshire for a period of one year from the date hereof at a salary computed in accordance with the terms hereunder specified. (2) In consideration of such appointment the manager hereby agrees to pay to the employer the sum of £750 on the signing hereof. (3) The emoluments of the manager shall consist of the whole of the profits of the business except the said sum of £750 and the manager shall have full liberty to conduct the business of the employer in whatever manner he considers fit without any hindrance or interference on the part of the employer. (4) The manager shall pay for all the goods supplied for the purpose of the business and shall discharge all the outgoings of the shop premises including the full rent for the year commencing March, 1957, and the rates and water rates and any other outgoings of a recurring nature in the like period. (5) The manager hereby indemnifies the employer against any liability arising in respect of his non-payment of any such outgoings or non-payment for goods supplied. (6) It is hereby declared that the said tenancy of the shop premises being dependent on the application of the Landlord and Tenant Act, 1954, it is expressly agreed that in the event of circumstances arising whereby the employer is deprived of the use of the shop or of the right to grant this agreement then the agreement shall be null and void and all the moneys paid hereunder shall be repaid to the manager forthwith."

Clause 7 provides for the repayment of certain sums on the death of the manager before or during the currency of the agreement.

"(8) For the purpose of this agreement the active season is defined as the duration of the following periods: Easter week-end, Whitsun week-end, July 1 until Oct. 1, 1957. (9) It is hereby expressly agreed and declared that in the event of the employer having ownership and control of the shop during the seasons of Easter, Whitsun and Summer of 1958 that the manager

shall have the first option to carry out similar transaction for that period as in respect of the current period on the same terms as are herein contained."

Mr. Glassman carried on business under that agreement during the season in 1957. He locked up the premises in September or October and the keys were returned to the landlord and then to the tenant. On Aug. 27, 1957, the landlord gave notice under s. 25 purporting to determine the tenancy on Mar. 2, 1958. On Sept. 20, 1957, the tenant notified the landlord that she would not be willing to give up possession of the property. On Dec. 17, 1957, she filed an application under s. 24 (1) of the Landlord and Tenant Act, 1954, asking for a new lease for seven years at a rent of £400 per annum. The landlord opposed the grant of a new tenancy and the application was duly heard.

Of the points relied on by the landlord in opposition to the grant of a new tenancy only two are now material. The first was a contention that the tenant was not in occupation of the premises for the purposes of a business carried on by her as required by s. 23 (1) of the Landlord and Tenant Act, 1954, and, therefore, the tenancy was not one that enabled her to make an application under s. 24 (1). Section 23 (1) reads as follows:

"Subject to the provisions of this Act, this Part of this Act applies to any tenancy where the property comprised in the tenancy is or includes premises which are occupied by the tenant and are so occupied for the purposes of a business carried on by him or for those and other purposes."

Section 24 (1) reads:

"A tenancy to which this Part of this Act applies shall not come to an end unless terminated in accordance with the provisions of this Part of this Act; and, subject to the provisions of s. 29 of this Act, the tenant under such a tenancy may apply to the court for a new tenancy—(a) if the landlord has given notice under the next following section to terminate the tenancy . . ."

(b) does not apply here.

The landlord's second point was an alternative contention that the tenant ought not to be granted a new tenancy because she had broken her obligations under the tenancy. Section 30 (1) reads:

"The grounds on which a landlord may oppose an application under s. 24 (1) of this Act are such of the following grounds as may be stated in the landlord's notice under s. 25 of this Act or, as the case may be, under s. 26 (6) thereof, that is to say [omitting (a) and (b) which do not apply] (c) that the tenant ought not to be granted a new tenancy in view of other substantial breaches by him of his obligations under the current tenancy, or for any other reason connected with the tenant's use or management of the holding."

Here it is said the tenant has parted with possession of the premises contrary to cl. 2 (4) of the tenancy agreement of May 10, 1955. The learned judge dealt with the question whether the tenant had sub-let, but he did not deal specifically with the question whether there had been a "parting with possession", words which, the landlord argues, are deliberately intended to cover something less than sub-letting. There is a further alternative point in the appeal in that it is said on behalf of the landlord that the learned judge fixed the rent of the new tenancy at too low a figure.

The first point depends on whether at the material times the premises were occupied by the tenant and were so occupied for the purposes of a business carried on by her. For the landlord it was argued that the material times are the dates of the filing of the application, namely, Dec. 17, 1957, and the hearing: Feb. 21, 1958. For the tenant it was argued that Mar. 2, 1958, is the material date. But we do not think that the situation differed materially at any of these dates, since by Dec. 17, 1957, Mr. Glassman had already returned the keys of the premises. Unless the premises were so occupied by the tenant at the

A material dates, the Act had no application and the court could not make the order.

Counsel for the landlord argues that under her agreement with Mr. Glassman the tenant had no part in the carrying on or control of the business or in whether it made a profit or a loss. She was, therefore, not in occupation of the premises for any business purposes at all. Further he argues that if it can be said that the tenant was occupied in the business of letting the concession of carrying on mock auctions or licensing another to occupy the premises, it was a business whose only aim was to exclude herself from possession of the premises and is, therefore, not within the Act. See the observations of JENKINS, L.J., in *Bagettes, Ltd. v. G.P. Estates Co., Ltd.* (1) ([1956] 1 All E.R. 729 at pp. 734, 735). In the unreported case of *Bobbio v. Watney, Combe, & Reid* (2), decided on July 13, 1955, in this court, PARKER, L.J., in the leading judgment said that a somewhat similar arrangement was a subterfuge to avoid a breach of a covenant against sub-letting and parting with possession, and that it clearly amounted to parting with possession. In that case, however, the tenant had granted exclusive occupation and the facts of the case were thereby more strongly in the landlord's favour than the facts in this case.

Counsel for the tenant argues that one must look at the whole picture of the tenant's activities to get a fair perspective of her arrangement with Mr. Glassman. One must look at the situation on Mar. 2, 1958, when the tenancy is alleged to have been determined, to see whether she was then in occupation of the premises and was so for the purposes of a business carried on by her. The arrangement with Mr. Glassman had been only another variant of the varying arrangements which she had made in previous years when she was undoubtedly in occupation for the purposes of a business carried on by her. The Glassman agreement contained nothing about repairs or inspection of the premises. To hold that it resulted in her parting with her occupation is to confuse the premises with the business. Though the tenant has ceased to be in occupation of the business, she remained in occupation of the premises, and, so remaining, she was there for the purposes of a business carried on by her, namely, letting out the auction concession. He instances the case of the owner of a dance hall who parts with control when someone hires it and runs a dance there. But we doubt if that example is really helpful, since if such a person let out his dance hall for the whole year with an option of renewal, he would, we think, be faced with the same arguments as face the tenant in this case. The application, it should be noted, alleges that the tenant's business is "sale by retail of fancy goods" and not the letting out of the auction concession. Counsel argues that Mr. Glassman's return of the keys to the tenant showed that his occupation was a transitory matter, and that thereafter the tenant resumed the thread of her business of mock auctions, which had a continuing existence. By March, 1958, Mr. Glassman had come and gone and she was again in full occupation. The interruption of Mr. Glassman's year does not end the tenant's business. Section 24 (3) gave the landlord an opportunity to end the tenancy on cesser of the tenant's business by serving a three to six months' notice, but he did not avail himself of that since he served a notice of more than six months under s. 25.

After considering the agreement between Mr. Glassman and the tenant, the learned judge said this:

"On the face of it, it purports to be an agreement for the employment of Mr. Glassman as manager of the tenant's shop at 89, Lumley Road. I think, however, that I am entitled, and indeed bound, to scrutinise the agreement, as in cases under the Rent Restrictions Acts, in order to see whether it is genuine and not a mere subterfuge for avoiding the Act of 1954. The form of the agreement is at first sight somewhat strange. It provides that the tenant shall employ Mr. Glassman as manager of her shop at a salary computed in accordance with the terms specified. The 'manager' agrees

in consideration of that appointment to pay to the employer the sum of £750. It is then provided that the emoluments of the manager shall consist of the whole of the profits except the said sum of £750 and that he is to have full liberty to conduct the business of the employer in whatever manner he considers fit without any hindrance or interference on her part. The manager is to pay for all goods supplied for the purpose of the business and discharge all outgoings, including rent and rates, and is to indemnify the employer in respect of the matters set out in the agreement. By cl. 6 it is declared that the tenancy of the shop (i.e., the tenant's tenancy) is dependent on the application of the Landlord and Tenant Act, 1954, and it is provided that in the event of her being deprived of the use of the shop or the right to grant the agreement, the agreement shall be null and void and the £750 be repayable to the manager."

He then refers to certain further provisions and continues:

"In my view the agreement is genuine in the sense that it was not a mere subterfuge designed for the purpose of preserving the tenant's rights under the Act. Mr. Glassman said that Mr. Arnold, who negotiated the arrangement, and signed the agreement on behalf of the tenant, said that the agreement must be drawn up designating Mr. Glassman as manager because the tenant was not allowed to sub-let. He further said that the agreement was a 'cover-up'. It is, I apprehend, legitimate for parties to devise arrangements so as to keep themselves within the four corners of the Act, provided that such agreements are not merely colourable devices for evading its provisions. In my opinion this was not such a mere colourable device. Whether or not 'manager' is a strictly appropriate way of describing Mr. Glassman's position, as to which I will say more hereafter, it seems to me plain that the tenant did not give up her right to enter upon the premises whenever she liked so long as she did not interfere with the conduct of the auctions by Mr. Glassman. She said she had keys or a key to the premises and I cannot see that she was in any way precluded from freely entering the premises either during or out of the 'active season' and she testified that she did in fact visit the premises about three times in 1957. I do not think it is possible to regard the agreement as creating a sub-tenancy on the face of it or as a cloak therefor. In my view, therefore, whether or not the relationship of employer and employee, or of principal and agent existed between Mr. Glassman and the tenant, the latter was in occupation of the premises."

We cannot agree with the learned judge that that agreement was not a sham. So far as it alleged that the tenant was the employer and Mr. Glassman was her manager, it seems to us that it was a mere fiction. She had no control whatever over Mr. Glassman's method of conducting the business. She had expressly agreed not to interfere. She had no interest in the financial result. She had received her £750; and whether he made a profit or a loss did not concern her. It seems clear to us that it was cast in those misleading terms so that it might take a form that would preserve the tenant's rights under the Act, and avoid putting her in breach of cl. 2 (4) of the tenancy agreement. The plain effect of it was that she had sold to him for £750 the right to occupy the premises for his mock auctions for a year with an option for a similar arrangement the year following, and he took over all liability in respect of outgoings during that year. Did she herself in spite of that remain in occupation of the premises for the purposes of a business carried on by her? In our view the answer must be no. It is true that she had a right to resort to the premises. It may be argued that technically she could have carried on some business activity that did not conflict with Mr. Glassman's auctions, but the agreement certainly does not indicate that such a thing was ever contemplated by the parties. In fact she did not do so. It seems to us that during the agreement

A with Mr. Glassman such theoretical residue of occupation as remained in her was not sufficient to give to her the protection of the Act. Nor, if she had any such occupation, was it for purposes of any business. What business can it really be said that she was carrying on? In our view none. She certainly was not carrying on the business of selling fancy goods by retail, which is alleged in her application, since Mr. Glassman was carrying on that business.

B In *Pegler v. Craven* (3) ([1952] 1 All E.R. 685), the plaintiff was the tenant under a lease of premises comprising living accommodation and a shop. The business of the shop was carried on by a company to which the landlord had assigned the goodwill at the request of the tenant; but the company paid no rent to the tenant and the shares of the company were held by the tenant and his wife, some relations and friends, and he was the managing director. He held alone rather less than half the shares of the company. It was held that the plaintiff was not the occupier of the shop seeing that the business of the shop was the business of the company and was not the tenant's business. He was not, therefore, entitled to the grant of a new lease under the Act. JENKINS, L.J., said (*ibid.*, at p. 687):

D "I agree that the conception of 'occupation' is not necessarily and in all circumstances confined to the actual personal occupation of the person termed the occupier himself. In certain contexts and for certain purposes it obviously extends to vicarious occupation by a caretaker or other servant or by an agent. Clearly the tenant of a retail shop who, through persons in his employment, carried on business there for his own benefit under a tenancy with respect to which he was tenant would properly be described as the occupier of the shop and the person carrying on business there, though not himself in actual personal occupation of it. I cannot regard the words 'the occupier of a shop' in s. 10 (1)* as going so far as to include as 'occupier' within the meaning of the sub-section a tenant who is not himself carrying on business on the premises in question at all, either personally or by a servant or agent, but who is tenant of premises, the shop portion of which is wholly taken up with the stock and the business of a limited company, i.e., of an entirely distinct and different legal person . . . †

E Further, it may be said that the reference to occupation by a person employed by the tenant for the purposes of the business carried on in the shop in itself suggests that the terms 'occupier' and 'occupation' are not used in the section in the unrestricted sense demanded by the argument put forward for the tenant, for, according to that argument, occupation, not merely by the tenant's servant, but by any third party with the tenant's consent, would be occupation by the tenant himself for the purposes of the section."

F

G

Again he said (*ibid.*, at p. 689):

H "Counsel for the tenant endeavoured to satisfy us that the expression 'occupier' in s. 10 (1) extended to any person carrying on business on the premises by permission of the tenant, whatever the interest of the tenant in the business might be and even if the tenant had no interest in it at all. He founded that argument on the theory that where a tenant entitled to the possession of premises grants a third party a licence to occupy those premises, the premises are in the occupation of the tenant by his licensee. I think the answer to that argument is that the meaning of the word 'occupation' is one which must be determined by reference to the context in which the expression is used, and, in my view, the context makes it reasonably plain that occupation by a third party under a licence otherwise than for the purpose of carrying on a business belonging to the tenant

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* I.e., of the Leasehold Property (Temporary Provisions) Act, 1951.

† The passage after the dagger is at p. 688 of the report.

himself does not suffice to make the tenant the occupier of a shop under a tenancy within the meaning of the Act."

It is true that in that case the Act under consideration was the Leasehold Property (Temporary Provisions) Act, 1951, where the relevant words [of s. 10 (2)] were:

"This section applies to a tenancy the subject of which . . . (b) consists of a shop and of living accommodation occupied wholly or mainly by the tenant or by a person who is employed by the tenant for the purposes of the retail trade or business carried on in the shop."

But in the Landlord and Tenant Act, 1954, the words of s. 23 (1), when read in the light of s. 23 (3) and s. 23 (4), are not greatly dissimilar, and those passages from the judgment of JENKINS, L.J., are applicable here. Section 23 (3) reads as follows:

"In the following provisions of this Part of this Act the expression 'the holding', in relation to a tenancy to which this Part of this Act applies, means the property comprised in the tenancy, there being excluded any part thereof which is occupied neither by the tenant nor by a person employed by the tenant and so employed for the purposes of a business by reason of which the tenancy is one to which this Part of this Act applies."

Section 23 (4) reads:

"Where the tenant is carrying on a business, in all or any part of the property comprised in a tenancy, in breach of a prohibition (however expressed) of use for business purposes which subsists under the terms of the tenancy and extends to the whole of that property, this Part of this Act shall not apply to the tenancy unless the immediate landlord or his predecessor in title has consented to the breach or the immediate landlord has acquiesced therein."

Further matters fall to be considered. It was contended in this court for the first time that even if the Act did not apply to these premises during the time of Mr. Glassman's occupation, it applied to them at material times thereafter. Now these premises were brought under the Act by s. 24 (1), which reads:

"A tenancy to which this Part of this Act applies shall not come to an end unless terminated in accordance with the provisions of this Part of this Act. . . ."

Sub-section (3) provides:

"Notwithstanding anything in sub-s. (1) of this section,—(a) where a tenancy to which this Part of this Act applies ceases to be such a tenancy, it shall not come to an end by reason only of the cesser, but if it was granted for a term of years certain and has been continued by sub-s. (1) of this section then (without prejudice to the termination thereof in accordance with any terms of the tenancy) it may be terminated by not less than three nor more than six months' notice in writing given by the landlord to the tenant; (b) where, at a time when a tenancy is not one to which this Part of this Act applies, the landlord gives notice to quit, the operation of the notice shall not be affected by reason that the tenancy becomes one to which this Part of this Act applies after the giving of the notice."

The words "notice to quit" are defined by s. 69 (1) as meaning

"... a notice to terminate a tenancy (whether a periodical tenancy or a tenancy for a term of years certain) given in accordance with the provisions (whether express or implied) of that tenancy."

It is, we think, clear that during Mr. Glassman's occupation a three to six months' notice could have been given, and the fact that the tenancy becomes one to which the Act applies (e.g., by subsequent resumption by the tenant of occupation for the purposes of a business carried on by her) would not have

A affected the operation of that notice (s. 24 (3) (b)). But the notice in fact given was a notice in excess of six months under s. 25 (1) and that section has no such provision as s. 24 (3) (b) to prevent the notice being affected by the fact that the tenancy subsequently becomes one to which the Act applies. If, therefore, in this case at the material dates the tenancy has once again, after the interlude of Mr. Glassman's occupation, become a tenancy to which the Act applies, the tenant is entitled to apply for a new tenancy.

B If one looks at the position as it existed on Dec. 17, the date of the application, or on Mar. 2, 1958, the date of the expiry of the notice under s. 25, were the premises then premises to which the Act applies or, in other words, were they occupied by the tenant for the purposes of a business carried on by her?

C Where premises are only occupied during seasonal periods, that question has additional difficulties. It must, we think, be a question of fact and degree whether premises that, for instance, are used only for summer purposes can be said to be so occupied during the winter months. The answer to the question will no doubt depend partly on the length of the gap between the intermittent activities, especially in view of the past history of the occupation. If the tenant in this case had been in occupation for the purposes of a business carried on by her during the summer season of 1957, as well as those of 1955 and 1956, she would clearly, we think, be held to be in such occupation in the inactive months in the winter and spring of 1957-58. But in 1957 she had by the agreement with Mr. Glassman ceased her occupation for the purposes of a business carried on by her and broken the thread of her business.

D The inference of continuous occupation, that during the vacant months of winter she could formerly successfully ask the court to draw in her favour from her summer occupation for the purposes of her business, is no longer available to her. We are asked to draw that inference from her answer given in evidence:

E "If I get tenancy and Glassman does not exercise option Arnold will carry on [presumably she meant as her agent]. I have the keys."

F In our view, particularly in view of the sham agreement with Mr. Glassman, that evidence is not sufficient to support the inference. She can hardly complain if her more recent activities are taken as a better guide than her earlier ones, especially since there is no evidence that she was going to give up living at Derby. Once the premises have ceased, as did these, to be premises to which the Act applies, some clearer indication is needed to bring them again within the Act. Indeed, we doubt if a mere intention to restart such a business in the coming season (a fortiori if it were only a conditional intention) would be enough to bring the premises again within the Act when once the thread of continuity has been broken and the premises have ceased to be within it. They were not then occupied by the tenant for the purposes of any business carried on by her and they had not been so occupied during the preceding season. In our view, notwithstanding Mr. Bramall's able and forceful argument for the tenant, the premises are not shown to be within the Act either on Dec. 17, 1957, or on Feb. 21, 1958, or on Mar. 2, 1958, and the tenant's application was, therefore, ill founded.

H It therefore becomes unnecessary to consider the question whether the learned judge should have refused her application on the ground of her alleged breach of agreement not to part with possession.

I In our view the appeal should be allowed.

Appeal allowed. Leave to appeal to the House of Lords refused.

Solicitors: *Kennedy, Genese & Syson*, agents for *Hodgkinson & Beevor*, Newark (for the landlord); *Beach & Beach* (for the tenant).

[Reported by HENRY SUMMERFIELD, ESQ., Barrister-at-Law.]

Re SERENE SHOES, LTD.

[CHANCERY DIVISION (Vaisey, J.), October 7, 1958.]

Company—Winding-up—Voluntary winding-up—Stay of proceedings—Report by official receiver before making order—Whether court has jurisdiction to order such a report—Companies Act, 1948 (11 & 12 Geo. 6 c. 38), s. 256 (2), s. 307 (2).

The liquidator and the contributories of a company that was in voluntary liquidation applied to the court under s. 307* of the Companies Act, 1948, for an order staying all further proceedings in the winding-up or for such other order as the court thought fit. On the hearing of the application the registrar made an order directing "the official receiver" to furnish to the court a report pursuant to s. 256 (2)† of the Act of 1948. It appeared that there were six official receivers. On motion by the liquidator and the contributories for the order to be discharged or varied,

Held: the order was bad on the face of it and would be set aside, as it was impossible to ascertain which of the official receivers was thereby ordered to furnish the report.

SEMBLE there is not jurisdiction under s. 307 (2) of the Companies Act, 1948, to direct any official receiver to furnish to the court a report under s. 256 (2) in a voluntary winding-up.

[**Editorial Note.** The dictum in the present case is limited to the particular power conferred by s. 256 (2) of the Companies Act, 1948, as an order staying proceedings may be made in a voluntary winding-up under the joint effect of s. 256 (1) and s. 307 of the Act; see 6 HALSBURY'S LAWS (3rd Edn.) 702, para. 1397, note (i).

As to the powers of the court on applications in the course of a voluntary winding-up, see 6 HALSBURY'S LAWS (3rd Edn.) 753, para. 1521.

For the Companies Act, 1948, s. 256 and s. 307, see 3 HALSBURY'S STATUTES (2nd Edn.) 662, 693.]

Case referred to:

- (1) *Re Campbell Coverings, Ltd.*, [1953] 2 All E.R. 74; [1953] Ch. 488; 10 Digest (Repl.) 1056, 7328.

Motion.

The liquidator in the voluntary winding-up of the company and the three persons claiming to be the sole contributories of the company applied to the court to discharge or vary an order made by Mr. Registrar BOWYER on Sept. 12, 1958. By an originating summons dated Aug. 27, 1958, the liquidator and the contributories applied, under the Companies Act, 1948, s. 307, for an order that all further proceedings in the winding-up of the company be stayed or for such further or other order as to the court should seem meet. By the order dated Sept. 12, 1958, it was ordered that the official receiver should furnish to the court a report pursuant to s. 256 (2) of the Act of 1948, and the further hearing of the originating summons was adjourned.

B. J. H. Clauson for the applicants, the liquidator and the contributories.
Denys B. Buckley appeared as *amicus curiae*.

VAISEY, J.: This is an application by way of a motion to discharge, or, alternatively, to vary, an order made by Mr. Registrar BOWYER on Sept. 12, 1958. The order is as follows:

"It is ordered that the official receiver do furnish to the court a report pursuant to s. 256 (2) of the Companies Act, 1948."

* The terms of s. 307 (1) and s. 307 (2) are printed at p. 317, letters C and D, post.

† The terms of s. 256 (2) are printed at p. 317, letter B, post.

A An interesting discussion has arisen on a point such as that which was considered by the Court of Appeal in *Re Campbell Coverings, Ltd.* (1) ([1953] 2 All E.R. 74)*. That point may be summarised thus. Section 256, which gives the court power to stay a winding-up, contains, in sub-s. (2), a provision that on any application made under that section:

B "... the court may, before making an order, require the official receiver to furnish to the court a report with respect to any facts or matters which are in his opinion relevant to the application."

C That is the first of a fasciculus of sections which are headed "General powers of court in case of winding-up by court." Both sub-s. (1) and sub-s. (2) of s. 256 are perfectly apt and easy to apply in the case to which the section normally applies, that is, the case of a winding-up by the court. The difficulty arises when one turns to s. 307, which provides:

D "(1) The liquidator or any contributory or creditor may apply to the court to determine any question arising in the winding-up of a company, or to exercise, as respects the enforcing of calls or any other matter, all or any of the powers which the court might exercise if the company were being wound up by the court.

"(2) The court, if satisfied that the determination of the question or the required exercise of power will be just and beneficial, may accede wholly or partially to the application on such terms and conditions as it thinks fit or may make such other order on the application as it thinks just."

E The expression "just and beneficial" in sub-s. (2) looks rather like the equivalent of the more familiar expression "just and equitable", and I do not know what the difference is between the two expressions.

F The short question is whether s. 307 introduces into the machinery of voluntary winding-up the provisions of s. 256 (2) to which I have already referred. It is under those two sections that the order of Mr. Registrar BOWYER was made. Counsel for the applicants pointed out various difficulties in fitting the provisions of s. 256 (2) into the body of voluntary winding-up procedure. He pointed out, in the first place, that sub-s. (2) of s. 256 refers to "any application under this section." That must mean s. 256. The application under which the order complained of was made was not "under this section" at all but under the enabling powers conferred by s. 307. Then there is a further curious point, namely, that the order which was made under s. 256 (2) requires that "the official receiver do furnish to the court a report" with respect to certain matters therein mentioned. What is meant by the term "official receiver"? It is an expression which is quite out of place if one is dealing with a voluntary winding-up, and, for the reasons referred to in the decision of the Court of Appeal in *Re Campbell Coverings, Ltd.* (1), it looks very much as though the power conferred by s. 256 (2) is one which does not fit with the machinery of voluntary winding-up. The order which was made, and which is now sought to be set aside, says this: "It is ordered that the official receiver do furnish to the court a report." I pause to inquire "What official receiver"? The official receiver, as such, does not come into a voluntary winding-up at all. I am informed that there are, in fact, no fewer than six official receivers. Which of them is supposed to furnish the court with his report I have no power to discover.

I Without doing more than pointing out the difficulty of discovering the basis of the jurisdiction under which this order was made, I think that the order was bad on the face of it—that it was incapable of being made effective. Nobody knows which of the number of official receivers is the person indicated and,

* The decision in *Re Campbell Coverings, Ltd.* ([1953] 2 All E.R. 74) was concerned with s. 236 and s. 307 of the Companies Act, 1948, and the question whether conditions appropriate only to a compulsory winding-up were inserted into a voluntary winding-up by reason of s. 307, the particular condition in that case being the making of a further report by the official receiver under s. 236 (2).

therefore, obliged to comply with the direction which is contained in the order. A
I should have thought that the order was unworkable and could not be treated
as in any way dealing with anything ascertainable or imposing any obligation
which could possibly be enforced by the court. For that reason alone, the
impossibility of finding out exactly what the order means and what is intended
by the expression "official receiver", I think that, on this application, I must
set aside the order and declare it to be a nullity. B

Order of Sept. 12, 1958, set aside accordingly.

Solicitors: *Lieberman, Leigh & Co.* (for the applicants); *Solicitor, Board of Trade.*

[*Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.*] C

R. v. GOVERNOR OF H.M. PRISON, BRIXTON, D

Ex parte MINERVINI.

[QUEEN'S BENCH DIVISION (Lord Parker, C.J., Cassels and Streatfeild, JJ.),
October 6, 7, 1958.]

Extradition—Territory—Alleged crime committed in Norwegian ship—No E
evidence as to position of ship—Whether ship in the "territory" of Norway
within the meaning of the extradition treaty of 1873—Extradition Act, 1870
(33 & 34 Vict. c. 52), s. 25.

Extradition—Habeas corpus—Whether requisitioning government may be
directed to be served and may be heard on application for habeas corpus.

The representative of a government requisitioning the extradition of an
alleged criminal, who has been committed to prison pending extradition,
may be directed to be served (under R.S.C., Ord. 59, r. 17) with notice of
motion on his behalf for habeas corpus and may be represented and heard
on the motion. F

An Italian seaman, M., who was alleged to have murdered a fellow seaman
on board a Norwegian ship, was arrested and committed to prison by the
chief magistrate at Bow Street to await extradition. Article 1 of the
Extradition Treaty of 1873 with Norway provided: "The High Contracting
Powers engage to deliver up to each other those persons who, being accused
or convicted of a crime committed in the territory of the one party, shall
be found within the territory of the other party . . ." Article 2 listed the
crimes to be treated as extradition crimes, number 17 being "assaults on
board a ship on the high seas, with intent to destroy life or to do grievous
bodily harm". No evidence had been given before the chief magistrate
as to the position of the ship when the alleged crime took place, but
it appeared that the ship had been six days' sailing from port. M.
applied for habeas corpus on the ground that it had not been shown that the
alleged crime was extraditable as there was no evidence that it was com-
mitted in the territory of the Norwegian government. G

- **Held:** there was jurisdiction to commit the applicant to prison because
in the treaty of June 26, 1873, the word "territory" was synonymous with
"jurisdiction" and the alleged crime was within the jurisdiction of the
Norwegian government wherever the ship was, even though, when in the
territorial waters of another Power, she was also in the jurisdiction of that
Power. H
I

A [**Editorial Note.** Though there was no decision in principle in the present case whether the requisitioning government was entitled to be heard, the court was prepared to hear counsel for that government. In this respect the present case may be contrasted with the decision of the High Court in Hong Kong, in *Re Wong Ka Cheong* ((1905), 1 Hong Kong L.R. 1, 9) and *Re Li Yu Mui* ((1910), 5 Hong Kong L.R. 227), though in the latter case it was said (at p. 231) that

B where the case was of grave importance to the foreign government an agreement might be reached for the representation of the foreign government (cf. *Re Castioni*, [1891] 1 Q.B. 149, 154).

As to applications for habeas corpus in extradition proceedings, see 11 HALSBURY'S LAWS (3rd Edn.) 32, para. 54; and as to extradition crimes, see 16 HALSBURY'S LAWS (3rd Edn.) 565-567, paras. 1158, 1159 and 1161.

C For the Extradition Act, 1870, s. 25, see 9 HALSBURY'S STATUTES (2nd Edn.) 888.]

Motion for habeas corpus.

The applicant, Onofrio Minervini, an Italian subject, was arrested for the alleged murder of a fellow seaman on board the motor tanker Vanja, sailing under the Norwegian flag, and was committed to Brixton Prison on Aug. 25, 1958, by the chief magistrate at Bow Street to abide an order of extradition made by the Secretary of State. The master of the ship stated in his affidavit that the ship was six days' sailing from port when the alleged crime was committed, but no evidence was given as to the exact position of the ship at the time. By art. 1 of the Extradition Treaty of 1873 with Norway it was provided:

E "The High Contracting Powers engage to deliver up to each other those persons who, being accused or convicted of a crime committed in the territory of the one party, shall be found within the territory of the other party . . ."

Article 2 listed the crimes which should be treated as extradition crimes, number 17 being "assaults on board a ship on the high seas, with intent to destroy life or to do grievous bodily harm". The applicant applied for the issue of a writ of habeas corpus.

F *Leonard Caplan, Q.C.*, and *L. J. Verney* for the applicant.

R. E. Seaton for the governor of Brixton Prison, the respondent.

Sir Frank Soskice, Q.C., and *Q. T. Edwards* for the Norwegian government.

G *Caplan, Q.C.*, took the preliminary point that the Norwegian government was not entitled to be heard on the motion*.

LORD PARKER, C.J.: Counsel for the applicant has raised a matter of principle, namely, whether on an application such as this the requisitioning government is entitled to be heard. We, however, find it unnecessary in the present case to decide that point of principle. We think that under R.S.C., Ord. 59, r. 17, the court has power in a proper case to direct that the notice of motion be served on the representative in this country of the requisitioning government so that the court can have the benefit of its views. We think that in the present case it would have been proper and convenient to give such a direction and though no direction was in fact given, the Norwegian government is here, represented by counsel, whom we will hear should the occasion arise.

I [THEIR LORDSHIPS then heard argument on the substantive question.]

LORD PARKER, C.J.: The applicant was a seaman on the Norwegian motor tanker Vanja, and he is accused of having murdered one Sigurd Aas on July 20, 1958, on board that vessel. There is no specific evidence as to the geographical position of the vessel at the time when the alleged murder is said to have taken place. All that we know is that it was some six days' steaming

* The two decisions of the court in Hong Kong, mentioned at letter A above, were cited in argument.

from port. The extradition proceedings were started as the result of a request by the government of the Kingdom of Norway under whose flag the Vanja was. A

Counsel for the applicant has raised two points in a very careful and ingenious argument. The first one is this: He says that before the learned chief magistrate could have jurisdiction he must be satisfied on certain facts which, if they turned out to be correct, showed that the applicant was accused of an extradition crime, and for that purpose he says that the extradition treaty must be looked at to see if the facts shown before the chief magistrate bring the case within it. The treaty in question here was one made between Queen Victoria and the governments of Sweden and Norway. It was dated June 26, 1873, and pursuant to the Extradition Act, 1870, was made the subject of an Order in Council dated Sept. 30, 1873, applying to it the provisions of the Act of 1870. I should say, to complete the story, that in 1907 there was a further Order in Council* applying the provisions of that treaty of June, 1873, with slight alterations, to the Kingdom of Norway alone. B C

By art. 1 of the treaty of June, 1873, it was provided as follows:

"The High Contracting Powers engage to deliver up to each other those persons who, being accused or convicted of a crime committed in the territory of the one party, shall be found within the territory of the other party, under the circumstances and conditions stated in the present treaty." D

Counsel for the applicant says that in the ordinary way "territory" and "jurisdiction" are two completely separate notions. "Territory" he would define as an area of the globe consisting of land with the territorial waters adjoining it. That being so, he says that a vessel on the high seas, at any rate outside territorial waters, cannot be in any sense a territory. The difficulty in his way is that when one looks at art. 2 and finds the list of the crimes which are to be treated as extradition crimes, one finds: E

"(16) Sinking or destroying a vessel at sea or attempting to do so.
(17) Assaults on board a ship on the high seas, with intent to destroy life or to do grievous bodily harm. (18) Revolt, or conspiracy to revolt, by two or more persons on board a ship on the high seas against the authority of the master." F

True, in general one would not construe art. 1 or extend the ordinary meaning of art. 1 by reference to art. 2 if it could be avoided. Counsel says that there is no real conflict between art. 1 and art. 2 because the items (16), (17) and (18) to which I have referred can be treated as referring to offences on vessels while within the territorial waters of Norway since, so he says, "high seas" in its ordinary meaning means high seas from low-water mark and therefore would include territorial waters. It seems to me that to read the provisions in that way is just nonsense. It is absurd to think that extradition proceedings will lie if a murder is committed just inside territorial waters and will not lie if it is alleged to have been committed just outside territorial waters. This treaty is not treating "territory" in its strict sense but in a sense which is equivalent to jurisdiction, and it is only in that way that one can make sense of the treaty. Indeed, it is to be observed, though it may be said to be an argument the other way, that in many of these treaties reference is made not to territory but to jurisdiction, but in my view in this treaty territory is equivalent to jurisdiction. It is also relevant, I think, in this connexion to consider the terms of the Extradition Act, 1870. Counsel for the applicant says quite rightly that the scope of the treaty cannot be enlarged by looking at the Act. With that I entirely agree, but in construing the words of the treaty one is entitled to look at the Act itself, because the two contracting parties in 1873 must have had in mind the Act of 1870 and the fact that an Order in Council would be made referring to G H I

* See S.R. & O. 1907 No. 545.

A the treaty and applying the provisions of the Act. Looking at the Act one finds that s. 25 provides:

B “For the purposes of this Act, every colony, dependency, and constituent part of a foreign state, and every vessel of that state, shall (except where expressly mentioned as distinct in this Act) be deemed to be within the jurisdiction of and to be part of such foreign state.”

C That no doubt is a provision for interpreting the Act. It begins with the words “For the purposes of this Act”, but nevertheless it seems to me to be a provision which cannot be ignored in considering the meaning of the treaty which was to be the subject of an Order in Council applying the provisions of the Act. In my view counsel for the applicant’s first argument fails.

D The second way in which he puts the case is this: Assuming that he is wrong and that “territory” must be given more than its ordinary meaning, yet it is impossible to say that it covers a ship at sea when it is within the territorial waters of a third Power because he says that that would be a gross breach of international comity; it would not only be legislating in respect of foreign territory but also would be assuming something which was within that territory to be the territory of another foreign country. In my view, it is quite unnecessary here to consider what is the true position of a ship, whether the country whose flag is flown merely has jurisdiction over the ship and those on board or whether it is to be treated for certain purposes as the territory of that Power; because if I am right in saying that “territory” in art. 1 of the treaty is equivalent to “jurisdiction”, then assuming that the ship was at the time of the alleged murder within the territory of a foreign Power, it would be only a matter of competing jurisdiction and no one suggests that it is wrong to legislate to provide for competing or concurrent jurisdiction. Accordingly, it seems to me that it matters not in this case whether the ship was in the middle of the North Sea, in the territorial waters of Norway, in the territorial waters of this country or in the territorial waters of any other Power; the Norwegian government had jurisdiction, and that is sufficient to enable these proceedings to be brought. Accordingly, it was unnecessary for any evidence to be tendered before the chief magistrate to show the position of the vessel and he had jurisdiction to make the order which he did. I would dismiss this application.

G CASSELS, J.: I agree.

STREATFEILD, J.: I also agree and have nothing to add to the judgment of my Lord.

Application dismissed.

Solicitors: *Crawley & de Reya* (for the applicant); *Director of Public Prosecutions* (for the governor of Brixton Prison); *Neil Maclean & Co.* (for the Norwegian government).

[Reported by E. COCKBURN MILLAR, Barrister-at-Law.]

R. v. MINISTER OF HOUSING AND LOCAL GOVERNMENT,
Ex parte RANK ORGANISATION, LTD.

[QUEEN'S BENCH DIVISION (Lord Parker, C.J., Cassels and Streatfeild, JJ.),
 October 9, 10, 1958.]

Town and Country Planning—Purchase notice—Confirmation—Refusal of confirmation—Permission for other development in lieu of confirmation—Development contemplated by decision not development within Sch. 3 to the Town and Country Planning Act, 1947—Whether decision ultra vires—Town and Country Planning Act, 1947 (10 & 11 Geo. 6 c. 51), s. 19 (2) and s. 19 (2A) added by Town and Country Planning Act, 1954 (2 & 3 Eliz. 2 c. 72), s. 70.

The ground lessees of a vacant site applied to the local planning authority for planning permission to build shops with living accommodation over. The application was refused and the applicants served a purchase notice under s. 19 of the Town and Country Planning Act, 1947, as amended by s. 70 of the Town and Country Planning Act, 1954*. The Minister of Housing and Local Government refused to confirm the purchase notice, but, in lieu of confirmation and in purported exercise of powers under s. 19 (2) (b), directed that permission be granted for residential development in the event of application being made in that behalf. On application for certiorari to quash this decision, on the ground that it was ultra vires,

Held: sub-section (2A) of s. 19 of the Town and Country Planning Act, 1947, applied to the whole of s. 19 (2) including proviso (b), with the consequence that under proviso (b) the only development for which the Minister could, in lieu of confirming the purchase notice, direct permission to be granted was development (semble, physical development not mere change of use) within Sch. 3 to the Act of 1947; and since the development for which permission had been directed was not Sch. 3 development, the direction was ultra vires and certiorari to quash the Minister's decision would be granted.

[**Editorial Note.** The reasoning at p. 325, letters G to I, post, shows, it is thought, that the consideration which is legitimate for the purposes of reaching a decision under proviso (b) to s. 19 (2) of the Town and Country Planning Act, 1947, is whether physical development (such as the erection of buildings) of a class that is within Sch. 3 to the Act will render the land reasonably capable of beneficial use within a reasonable time.

For the Town and Country Planning Act, 1947, s. 19 and Sch. 3, see 25 HALSBURY'S STATUTES (2nd Edn.) 517 and 644; and for the Town and Country Planning Act, 1954, s. 70, see 34 HALSBURY'S STATUTES (2nd Edn.) 992.]

Motion for certiorari.

This was a motion for an order of certiorari to remove into the High Court and quash a decision of the Minister of Housing and Local Government dated Dec. 19, 1957, and made under s. 19 of the Town and Country Planning Act, 1947, as amended by s. 70 of the Town and Country Planning Act, 1954. The applicants, the Rank Organisation, Ltd., were the lessees for a term of ninety-nine years commencing in 1937 of a piece of land, about an acre in area, in the borough of Ilford. The land was at all material times a vacant site and could not be developed by carrying out development of any class within Sch. 3 to the Town and Country Planning Act, 1947. The applicants applied to the local planning authority for planning permission to build shops with living accommodation over. This application having been refused, they served on the Ilford Borough Council a purchase notice under s. 19 (1) of the Town and Country Planning Act, 1947. After a hearing before an inspector of the Ministry of Housing and

* The relevant terms of s. 19 (1) (2) and sub-s. (2A) are printed at p. 323, letter H, to p. 324, letter D, and p. 324, letter H, post.

- A Local Government the Minister decided in exercise of powers under s. 19 (2) (b) of the Town and Country Planning Act, 1947, to direct that permission should be granted, in the event of an application being made in that behalf, for the residential development of the land. He did not confirm the purchase notice. His formal decision was issued by letter dated Dec. 19, 1957. The Minister had previously stated in a letter dated Nov. 14, 1957, that the condition specified
- B in s. 19 (1) (a), viz., that the land had become incapable of reasonably beneficial use in its existing state, was satisfied, but he did not state whether he was satisfied that the condition specified in s. 19 (1) (c) had been fulfilled. Residential development of the land was not development of a class specified in Sch. 3 to the Act of 1947. The applicants applied for certiorari on the ground that in coming to his decision the Minister was acting without, or in excess of, his
- C jurisdiction.

Roy Wilson, Q.C., and Desmond Neligan for the applicants, the Rank Organisation, Ltd.

Rodger Winn for the respondent, the Minister of Housing and Local Government.

- D **LORD PARKER, C.J.:** The applicants, the Rank Organisation, Ltd., are ground lessces of a site adjoining Eastern Avenue in the borough of Ilford of about an acre in extent having a frontage of some 150 yards to Eastern Avenue and a depth of some thirty-five yards. Apparently it was at one time agricultural land but it is now bordered by the road and surrounded with development and is referred to as an undeveloped site. In March of last year the applicants
- E applied to the local planning authority for planning permission to build shops with living accommodation over. In June, 1957, that application was refused. Thereon the applicants had certain rights as set out in s. 19 of the Town and Country Planning Act, 1947. Provision is there made that if planning permission has been refused and the applicant can satisfy the Minister of certain conditions the local authority will have to buy the land. An applicant who thinks that he
- F can fulfil the conditions serves a purchase notice on the local planning authority and the local planning authority then transmit that notice to the Minister. If the Minister is satisfied that the conditions are fulfilled he must confirm the notice, subject to two provisos which are relevant here. One is that he may say that the applicants, notwithstanding the refusal of the local planning authority, can develop as they wish, or he can say that some other development which he, the
- G Minister, has in mind, is the development which should take place and he can direct that, if application is made, permission shall be granted. In the present case the Minister has decided that he will not allow the building of shops with accommodation over, and that he will not confirm the purchase notice but will allow residential development. It is said that that decision was not within his powers and that the court should quash it.

- H The question turns on s. 19 of the Town and Country Planning Act, 1947, as amended by s. 70 of the Town and Country Planning Act, 1954. So far as it is relevant, s. 19 (1) is in these terms:

- I "Where permission to develop any land is refused, whether by the local planning authority or by the Minister, on an application in that behalf made under this Part of this Act, or is granted by that authority or by the Minister subject to conditions, then if any owner of the land claims—(a) that the land has become incapable of reasonably beneficial use in its existing state . . . (c) in any case, that the land cannot be rendered capable of reasonably beneficial use by the carrying out of any other development for which permission has been or is deemed to be granted under this Part of this Act, or for which the local planning authority or the Minister have undertaken to grant such permission, he may, within the time and in the manner prescribed by regulations made under this Act, serve on the council . . . a notice (hereinafter referred to as a 'purchase notice') . . ."

By sub-s. (2) it is provided:

"Where a purchase notice is served on any council under this section, that council shall forthwith transmit a copy of the notice to the Minister, and subject to the following provisions of this section the Minister shall, if he is satisfied that the conditions specified in paras. (a) to (c) of the foregoing sub-section are fulfilled, confirm the notice . . ."

Thereupon certain consequences follow. Then it is provided:

"(a) if it appears to the Minister to be expedient so to do, he may, in lieu of confirming the purchase notice, grant permission for the development in respect of which the application was made or, where permission for that development was granted subject to conditions, revoke or amend those conditions so far as appears to him to be required in order to enable the land to be rendered capable of reasonably beneficial use by the carrying out of that development; (b) if it appears to the Minister, that the land, or any part of the land, could be rendered capable of reasonably beneficial use within a reasonable time by the carrying out of any other development for which permission ought to be granted, he may, in lieu of confirming the notice, or in lieu of confirming it so far as it relates to that part of the land, as the case may be, direct that such permission shall be so granted in the event of an application being made in that behalf."

Pausing there, it is clear in this case that the Minister was satisfied that sub-s. (1) (a) was fulfilled, namely, that the land had become incapable of reasonably beneficial use in its existing state. It is also clear, though not expressly stated in his decision, that he must have been satisfied in regard to the condition in sub-s. (1) (c), namely, that the land could not be

"rendered capable of reasonably beneficial use by the carrying out of any other development for which permission has been or is deemed to be granted under this Part of this Act, or for which the local planning authority or the Minister have undertaken to grant such permission."

That being so, *prima facie* he had to confirm the purchase notice subject to the provisos. He did not think it expedient to exercise his powers under proviso (a) to sub-s. (2), but he did say under proviso (b) that he would permit development for residential buildings and that if an application for that was made permission ought to be granted; and if the matter rested there, there would be no question but that his decision was fully within the powers of s. 19. Section 70 (1) of the Town and Country Planning Act, 1954, however, provided that a new sub-section should be inserted after sub-s. (2) in s. 19 of the Act of 1947, and the new sub-section, which is sub-s. (2A), is in these terms:

"In considering, for the purposes of the last foregoing sub-section, whether or not the use of land in any particular state is or would be reasonably beneficial, the Minister shall not take account of the possibility of any development, whether of that or any other land, of any class not specified in Sch. 3 to this Act."

It is said that that new sub-section prohibits the Minister from considering under proviso (b) to s. 19 (2) of the Act of 1947 any other development than the development set out in Sch. 3 to the Act of 1947. Schedule 3 sets out certain types of development. They are all development for which permission has to be obtained, but they are what are called excepted classes of development on which matters of compensation and other matters in the Act apply. It is sufficient for this purpose to say that a number of developments is provided for in Sch. 3, including developments of each of the two types to which the word "development" refers throughout these Acts. It is important to bear in mind that development under these Acts includes not merely physical development, such as erecting buildings, but includes a change of use whether buildings are erected

A or not. Schedule 3 deals with both types of development and in particular by para. 6 provides for the making of an order by the Minister whereby the use of buildings may be changed, and a number of uses have indeed been prescribed by order under that paragraph.

B It is clear that the new sub-s. (2A) of s. 19 of the Act of 1947 applies to the whole of the preceding sub-s. (2). It applies to three considerations. First to the consideration by the Minister whether he is satisfied that the condition in sub-s. (1) (a) has been fulfilled, namely, "that the land has become incapable of reasonably beneficial use in its existing state". I think that is clear because the new sub-s. (2A) says "whether or not the use of land in any particular state" is reasonably beneficial, referring quite clearly to the existing state referred to in s. 19 (1) (a). It also quite clearly applies by its wording to a consideration C whether s. 19 (1) (c) has been fulfilled, namely, whether the land can be rendered capable of reasonably beneficial use in the future, and again by its words it applies directly to proviso (b) to s. 19 (2), the consideration whether the land could be rendered capable of reasonably beneficial use. Prima facie, therefore, sub-s. (2A) does bite on and limit the powers of the Minister under proviso (b) D to s. 19 (2), and if that is the true view it is quite clear and admitted that the Minister here has exceeded his powers because the development of this land by the erection of residential buildings would be a development outside the developments set out in Sch. 3.

Counsel for the respondent has been forced to admit that prima facie the words of the new sub-section do apply to the Minister's power, but he seeks to contend that really on an analysis the new sub-s. (2A) only applies and was only E intended to apply to a consideration whether the conditions of s. 19 (1) (a) and (c) have been fulfilled. For my part I think that it may well have been that some such consideration was in mind, but the words plainly refer to proviso (b) to sub-s. (2), and I do not think that it can be said that by applying them to proviso (b) you are nullifying the powers of proviso (b). Counsel for the respondent F contended that the effect of the applicants' argument was that the Minister would have no powers under proviso (b) because, it being admitted that Sch. 3 development falls to be considered in determining whether the condition stated in s. 19 (1) (a) has been fulfilled, if the Minister is satisfied that no Sch. 3 development will make the land reasonably of beneficial use, then when he comes to s. 19 (2) (b) he cannot prescribe any development that will be a beneficial use G because he has in effect already determined the question. Counsel for the applicants, on the other hand, points out, and I think that he is right, that that argument overlooks what I have already referred to as the two meanings of development throughout this Act. He admits that the new sub-s. (2A) does apply to the consideration of condition (a)*, but quite clearly only in regard to change of use; in other words, the Minister can consider Sch. 3 change of use in determining whether land has become capable of reasonably beneficial use in its H existing state; but he cannot quite clearly consider development of the other class, namely, the erection of buildings because the very condition is directed to an existing state. Accordingly, even though he has considered change of use under s. 19 (1) (a) and determined that no change of use will make the land of reasonably beneficial use, yet when he comes to (b)† he can consider development in the other sense, for instance, he can consider whether development of the physical kind could make the land capable of beneficial use, and he is entitled I to do so provided he only considers development within Sch. 3. The words "could be rendered capable" in s. 19 (2) (b), viz., capable of reasonably beneficial use by the erection of buildings or the like, support that view. Thus there is room still for proviso (b) to s. 19 (2) to operate and the words of s. 19 (2A)

* I.e., the condition enacted in s. 19 (1) (a) of the Town and Country Planning Act, 1947.

† I.e., to the discretionary power conferred by s. 19 (2) proviso (b) of the Act of 1947.

plainly apply to that proviso. I can see no reason for limiting the words of s. 19 (2A) in such a way as not to apply to that proviso. For my part I think that this application succeeds and the order should go. A

CASSELS, J.: I agree.

STREATFEILD, J.: I also agree.

Order of certiorari granted. B

Solicitors: *Richards, Butler & Co.* (for the applicants); *Solicitor, Ministry of Housing and Local Government* (for the respondent).

[*Reported by E. COCKBURN MILLAR, Barrister-at-Law.*]

BAKER AND ANOTHER v. SIMS (ALSEN PROPERTIES, LTD., Third Party). C

[COURT OF APPEAL (Lord Evershed, M.R., Sellers and Pearce, L.J.J.), October 2, 3, 1958.]

Landlord and Tenant—Repair—Breach of covenant—Notice to remedy breach served on tenant—Counter-notice served by tenant—Assignment of lease and surrender by assignee—Action for damages for breach of covenant commenced by landlord without obtaining leave of court—Whether action maintainable—Leasehold Property (Repairs) Act, 1938 (1 & 2 Geo. 6 c. 34), s. 1 (3). D

The prohibition, enacted by s. 1 (3) of the Leasehold Property (Repairs) Act, 1938, against taking proceedings for breach of a repairing covenant, where the lessee has served a counter-notice under that section, ceases to apply where there is less than three years* of the term to run or where the lease has been surrendered. E

In 1931 the defendant became the tenant of certain premises under an underlease which contained a full repairing covenant on the part of the underlessee and was for a term ending on Dec. 18, 1959. In April, 1953, the plaintiff lessees, who were the defendant's lessors, served on him pursuant to s. 146 of the Law of Property Act, 1925, a notice of breaches of the repairing covenant in the underlease. In May, 1953, the defendant served a counter-notice, under s. 1 of the Leasehold Property (Repairs) Act, 1938, claiming the benefit of the Act. In 1954 the defendant assigned the underlease to a company and in December, 1955, the company surrendered the underlease to the plaintiffs. In November, 1957, the plaintiffs commenced an action against the defendant for damages for breaches of the repairing covenant alleged to have been committed during his tenancy. F

Held: leave of the court, under s. 1 (3) of the Leasehold Property (Repairs) Act, 1938, to commence the action was not required. G

Appeal allowed. H

[**Editorial Note.** The length of the unexpired period of the term originally contemplated by s. 1 of the Leasehold Property (Repairs) Act, 1938, was five years. This was the period relevant in the present case as the counter-notice was served in 1953. The period was reduced to three years by amendment by the Landlord and Tenant Act, 1954, s. 51 (2) (b), as is stated at p. 329, letter F, post. Accordingly three years is specified in the proposition stated above. I

As to the effect of a counter-notice by the tenant, see 23 HALSBURY'S LAWS (3rd Edn.) 588, para. 1272.

For the Leasehold Property (Repairs) Act, 1938, s. 1, see 13 HALSBURY'S STATUTES (2nd Edn.) 914.]

* The terms of s. 1 (3) are printed at p. 330, letter D, post.

A Cases referred to:

- (1) *National Real Estate & Finance Co., Ltd. v. Hassan*, [1939] 2 All E.R. 154; [1939] 2 K.B. 61; 108 L.J.K.B. 380; 160 L.T. 373; 31 Digest (Repl.) 543, 6659.
- (2) *Dwellings Developments, Ltd. v. Drake*, (1954), 163 Estates Gazette 192.
- (3) *Whitney v. Inland Revenue Comrs.*, [1926] A.C. 37; 95 L.J.K.B. 165; 134 L.T. 98; 28 Digest 105, 649.
- (4) *Church Comrs. for England v. Kanda*, [1957] 2 All E.R. 815; 3rd Digest Supp.
- (5) *Cusack-Smith v. Gold*, [1958] 2 All E.R. 361.

Appeal.

- C This was an appeal by the plaintiffs from an order made by His Honour JUDGE SIR SHIRLEY WORTHINGTON-EVANS at Clerkenwell County Court on Mar. 21, 1958, in an action against the defendant for damages, amounting to £249, in respect of breaches of the repairing covenant in an underlease of premises known as 4, Mitchison Road, Islington, London. The plaintiffs, as the trustees of the will of Elisha Ambler, deceased, were the lessees of the premises for the residue of a term of ninety-nine years from Dec. 25, 1860. In 1931 an underlease for the whole residue of the term less the last seven days thereof became vested in the defendant. On Apr. 29, 1953, the plaintiffs served on the defendant a notice, pursuant to the Law of Property Act, 1925, s. 146 (and containing the statement required by the Leasehold Property (Repairs) Act, 1938, s. 1 (4)), alleging breaches of the covenant to repair. On May 5, 1953, the defendant served on the plaintiffs a counter-notice under s. 1 of the Act of 1938, claiming the benefit of the Act. On Jan. 22, 1954, the defendant assigned the underlease to Alsen Properties, Ltd., the third party. On Dec. 5, 1955, the plaintiffs accepted a surrender of the underlease from the third party. In the action, which was commenced in November, 1957, the plaintiffs sought to recover from the defendant damages for breaches of the repairing covenant alleged to have been committed while the defendant was the sub-lessee. By his amended defence the defendant pleaded that, as he had served a counter-notice under s. 1 of the Act of 1938, the action was not maintainable because leave to take the proceedings had not been obtained as required by s. 1 (3). The issue raised by this plea was tried as a preliminary point of law. The county court judge held that the action was not maintainable and adjudged that a non-suit be entered.

B. C. Sheen for the plaintiffs.

F. H. L. Petre for the defendant.

- LORD EVERSHERD, M.R.: This appeal has raised a question of construction of the Leasehold Property (Repairs) Act, 1938, which is a question of very exceptional difficulty. The matter comes before us in this way. The plaintiffs (who are appellants in this court) are the lessees of certain property known as 4, Mitchison Road, Islington, under a lease for ninety-nine years from Dec. 25, 1860. An underlease had been granted of that term, less the last seven days, and at the relevant date was vested in the defendant (the respondent), Mr. Sims. The underlease would have expired on Dec. 18, 1959, in any event, but (as will presently appear) it has, in fact, been surrendered. The defendant acquired his interest in 1931, and in 1952 the plaintiffs took the view that there had been and was continuing to be a breach of the covenant for repair, which is in the usual form in a full repairing lease. A schedule of alleged breaches was prepared and was served on the defendant, with a notice pursuant to the Act of 1938, in April, 1953. In the following month the defendant served a counter-notice under the same Act. Nothing, however, then transpired; no proceedings were taken; but in the following year, 1954, the defendant assigned the unexpired remainder of his term under the sub-lease to a limited company, Alsen Properties,

Ltd., which was joined as third party in these proceedings, but which is not a party to this appeal. In December, 1955 (some four years, therefore, before the expiration by effluxion of time of the sub-lease), the third party surrendered the term to the plaintiffs and the surrender was accepted. In November, 1957, the present proceedings were commenced by way of a claim by the plaintiffs against the defendant for damages for breaches of the repairing covenant which, it was alleged, had been committed during the time that the defendant was the sub-lessee. A B

When the matter came before His Honour JUDGE SIR SHIRLEY WORTHINGTON-EVANS in the county court, the point was taken on behalf of the defendant that the action was incompetent because in the circumstances the leave of the court to the commencement of the proceedings was a pre-requisite for the jurisdiction of the court. Admittedly, no leave had been asked for or obtained. C Whether leave was required is the question which we now have to determine, and it turns particularly on the language of s. 1 (3) of the Act of 1938. The learned county court judge came to the conclusion that the point taken by the defendant was well taken, that in default of leave having been obtained there was no right to sue, and he, therefore, dismissed the claim. It is from that decision, on what was treated as a preliminary question of law, that the appeal comes to this court. D Briefly put, the submission of counsel for the defendant is that, if one looks at sub-s. (3), on its own terms, with one's mind unaffected and unbiassed by anything which one thinks is to be discerned from the other sub-sections in the same section, then the result is plain enough: it is that, once a counter-notice has been served (and those last words I take from counsel's argument), then there is an absolute bar against proceedings of this kind without leave of the court. E

In order to answer the problem it is, I think, necessary to have some regard to history; for one cannot (and so much counsel for the defendant conceded) properly construe a particular paragraph in an Act of Parliament without at least having in one's mind the relevant context in which it appears. For present purposes, I must go back to the Law of Property Act, 1925, to make a reference to s. 146, the well-known section which imposed a restriction on a landlord's right to forfeit or re-enter for breach of covenant. That restriction was not novel. Section 146 was a re-enactment (though not in quite the same terms) of the previous restriction which appeared in the Conveyancing Act, 1881, s. 14. Section 146 (1) of the Act of 1925 is well-known. It provides that a right of re-entry or forfeiture under any proviso or stipulation in a lease for breach of any covenant is not enforceable, by action or otherwise, unless and until the lessor serves on the lessee a notice (a) specifying the breach, (b) requiring remedy if it is capable of remedy, and (c) requiring the lessee to make money compensation. Observe that the restriction is one related only to re-entry or forfeiture, but it is not limited in regard to the particular breach of covenant on which the claim may be founded. The Leasehold Property (Repairs) Act, 1938, picks up, so to speak, the matter from s. 146 of the Act of 1925, and confers a new benefit on lessees, going beyond that given by s. 146, but nevertheless, in some respects at any rate, plainly limited. Section 1 (1)* of the Act of 1938 reads: F G H

"Where a lessor serves on a lessee under s. 146 (1) of the Law of Property Act, 1925, a notice that relates to a breach of a covenant or agreement to keep or put in repair during the currency of the lease a house of a rateable value of £100 or less, and at the date of the service of the notice five years or more of the term of the lease remain unexpired, the lessee may within twenty-eight days from that date serve on the lessor a counter-notice to the effect that he claims the benefit of this Act." I

* Section 1 (1) of the Act of 1938 was amended by s. 51 (2) of the Landlord and Tenant Act, 1954, which substituted the words "all or any of the property comprised in the lease" for the words "a house of a rateable value of £100 or less", and the word "three" for the word "five" cf. p. 329, letter F, post.

- A Observe at this point that the effect of s. 1 (1) of the Act of 1938 is, first, that it is limited to cases where notice under s. 146 of the Act of 1925 is founded on a breach of repairing covenant: secondly, that it is limited to the case of a long term lease, where the house is of a small rateable value, and, this being the vital point for present purposes, "at the date of the service of the notice five years or more of the term of the lease remain unexpired . . ." Given those conditions,
- B then, if the notice under s. 146 of the Act of 1925 is served (as it would have to be served), the lessee is given a right to serve a counter-notice claiming "the benefit of [the] Act".

I pass now to s. 1 (2) of the Act of 1938 which takes the matter a stage further and gives to the lessee a further right. Sub-section (2) no longer is confined to the case of the lessor seeking forfeiture or re-entry, but relates to a claim for damages—but, again, only where the breach alleged is a breach of a repairing covenant; and once again there is the limitation that, if the lessee is to have this right to claim the benefit of the Act, there must be five years or more of his term unexpired. I will read sub-s. (2):

- D "A right to damages for a breach of such a covenant as aforesaid [a repairing covenant] shall not be enforceable by action commenced at any time at which five years or more of the term of the lease remain unexpired unless the lessor has served on the lessee not less than one month before the commencement of the action such a notice as is specified in s. 146 (1) of the Law of Property Act, 1925, and where a notice is served under this sub-section, the lessee may, within twenty-eight days from the date of the service thereof, serve on the lessor a counter-notice to the effect that he claims the benefit of this Act."
- E

In order to dispose of the point at this stage, it is right to say that those provisions have been amended, in the lessee's favour, by s. 51 of the Landlord and Tenant Act, 1954. Section 51 (1) of the Act reads:

- F "The Leasehold Property (Repairs) Act, 1938 (which restricts the enforcement of repairing covenants in long leases of small houses) shall extend to every tenancy (whether of a house or of other property, and without regard to rateable value) where the following conditions are fulfilled, that is to say . . . (b) that three years or more of the term remain unexpired at the date of the service of the notice of dilapidations or, as the case may be, at the date of commencement of the action for damages . . ."

- G Paragraph (a) of s. 51 (1) relates to the length of the term of tenancy, and para. (c) excludes agricultural holdings. The amending provision has no relevance to this particular case and I, therefore, shall proceed by assuming that the conditions as they were laid down in s. 1 (1) and (2) of the Act of 1938 are the relevant conditions. No question turns on the rateable value of the house. The vital matter is that sub-s. (1) and sub-s. (2) contemplate a restriction where (putting it briefly) five years or more of the term—the lessee's interest—remain unexpired.
- H

So far it will be noted that the two sub-sections have conferred, in the circumstances (and the plainly limited circumstances) stated, a right to a lessee to claim "the benefit of this Act". We have not been told yet what "the benefit" of the Act exactly is; but at this stage I find it useful to interpolate a reference to language used by GODDARD, L.J., in *National Real Estate & Finance Co., Ltd. v. Hassan* (1) ([1939] 2 All E.R. 154), a case under the Act of 1938. I need not read the facts of the case. I refer to the judgment because the learned lord justice stated (and, in my respectful view, correctly stated) what the mischief was that the Act of 1938 was designed to remedy. The lord justice said ([1939] 2 All E.R. at p. 161):

"The mischief it was designed to remedy was that occurring where speculators buy up small property in an indifferent state of repair, where any sort of schedule of dilapidations can be served upon the tenants, which

the tenants cannot comply with. I am not saying that it applies to this case, but the general mischief is that the speculator buys at a very low price, turns out the tenants, and gets the reversion which he has never paid for, which is a great hardship to the tenants."

That passage makes quite clear the significance of the five-year period—a significance which, to my mind, is reinforced when one comes (as I shall have to do presently) to the later sub-sections of s. 1 of the Act of 1938. So far, if the view of GODDARD, L.J., is right (as I humbly take it to be entirely right), then "the benefit" which the Act confers is plainly to be anticipated as something to protect the tenant of a small house where the tenant has a long-term lease of which at any rate five years still remain to run: the landlord is not to be able, by exercising the rights of forfeiture or damages, to get for nothing (in effect) the reversion five years before it falls in.

I now come to the vital sub-s. (3) of s. 1 of the Act of 1938. Section 1 (3) reads:

"Where a counter-notice is served by a lessee under this section, then, notwithstanding anything in any enactment or rule of law, no proceedings, by action or otherwise, shall be taken by the lessor for the enforcement of any right of re-entry or forfeiture under any proviso or stipulation in the lease for breach of the covenant or agreement in question, or for damages for breach thereof, otherwise than with the leave of the court."

As I have already indicated, the argument which found favour with His Honour, and which counsel for the defendant put before us with great force, is this. If one reads that sub-section, the words of themselves, unilluminated (or, as counsel would say, undeflected) by anything which has gone before or will follow after, there is the benefit quite plainly stated, viz., again I revert to counsel's own words—once a counter-notice has been served, then no action or proceeding to enforce, by way of forfeiture or claim for damages, the alleged breach of a repairing covenant, can be taken by the landlord save with the leave of the court.

Counsel for the defendant submitted, and the county court judge held, that, as a counter-notice was served by the defendant on the plaintiffs in 1953, that put a complete stop on the plaintiffs' right to sue without leave for damages for breach of the repairing covenant, even though, when they brought their action, not only was there less than five years of the lease to run, but also the term had ceased to exist by virtue of surrender. If that view is right, it is again conceded by counsel for the defendant that the results are far-reaching—and he admitted that they might, in certain circumstances, be remarkable, and, indeed, impose a real hardship on a landlord. Of the examples which counsel for the plaintiffs put before us, I will take one, to illustrate the point. Let it be supposed that, in the latter part of 1938, when the Act of 1938 had come into force, a notice of dilapidations was served on the tenant; that the tenant then served a counter-notice, but that good relations prevailing, what was complained of was then put right, to the satisfaction of the landlord—that no proceedings were ever taken—and that there the matter remained for twenty years. Then in 1958—when (assuming no surrender) a year of the lease remains to go—serious damage is discovered to have been done to a wall or to the roof, since 1938. What is the right of the landlord? If counsel for the defendant is right, the landlord must then proceed to obtain the leave of the court—not, as I understand, requiring any fresh service of any notices or anything of that kind, since, once a counter-notice has been served, the restriction is there: the landlord must go to the court and get leave to bring the proceedings, although only a year remains of the lease. If that is right, it is quite plain that the restriction is one which is quite different from anything which one would suppose, from the reading of s. 1 (1) and s. 1 (2) of the Act of 1938, was going to follow: the five-year limit has ceased to have any relevance: and yet (as GODDARD, L.J., pointed out) the remedy designed for the

A mischief was to protect the lessee from the lessor who sought, while there was still a substantial period of time left to the lessee under his term, to try, in effect, to get the benefit of the reversion. In other words, if that view is right, it is plain that the benefit—the privilege—conferred by s. 1 (3) of the Act of 1938, is something much more far-reaching than, and quite distinct from, anything contemplated or adumbrated by s. 1 (1) and s. 1 (2).

B The learned county court judge, however, felt compelled to hold that that was the result. He drew attention in his judgment to the point that the words in sub-s. (3) are “Where a counter-notice is served”, and not (as, it was contended, the words would more naturally have been, if such a wide and far-reaching restriction was intended) “Once a counter-notice has been served”. But he concluded that the words of sub-s. (3) were too compelling to allow him, C by some interpolation, by some gloss on the language, to make sub-s. (3) fit more closely with sub-s. (2) by injecting into sub-s. (3), by some means, the five-year period.

The view which the learned judge took is at variance with the view which had been taken on exactly the same point by the official referee His Honour BRETT CLOUTMAN, Q.C., in *Dwellings Developments, Ltd. v. Drake* (2) ((1954), 163 D Estates Gazette 192). Unfortunately the learned county court judge did not have the advantage of seeing that case. The official referee, in the report of his judgment, is recorded as saying (163 Estates Gazette at p. 193):

“The defendant’s argument [which was the argument of the defendant in the present case] would indeed be formidable if sub-s. (3) were read in isolation, but if s. 1 is read as a whole, the difficulty and the strange conclusion to which this argument leads both disappear. Reading sub-s. (2) and sub-s. (3) together, it is, I think, plain that the proceedings by action or otherwise in sub-s. (3) (restricted to cases where the leave of the court has been obtained) are to be defined and limited in the same way as the action which is restricted in sub-s. (2) (that is, cases where a notice under s. 146 of the Law of Property Act, 1925, is to be served). In each case the action restricted is one commenced at any time at which five years or more of the term remain unexpired. I do not think that actions within the five-year period are affected, nor are actions commenced after the expiration of the term. To hold otherwise would not further the general purposes of the Act, and, on the other hand, would seem to result both in injustice and, as I think, absurdity.”

G Whether it is necessary to go the length of using the word “absurdity” is, perhaps, another matter; but on the general view which the official referee expressed I have come to the conclusion, on the whole, that I would agree with him.

H I have referred to the proleptic phrase “the benefit of this Act” in sub-s. (1) and sub-s. (2). I have referred* to the language of GODDARD, L.J., stating the mischief which this Act was designed to remedy. I would add at this point one further matter which has struck me a little forcibly. It will be recalled that sub-s. (3) says:

“Where a counter-notice is served by a lessee under this section, then, notwithstanding anything in any enactment or rule of law . . .”

I It would appear that, if the argument for the defendant here is right, then “any enactment” referred to would have to include, or should safely include, sub-s. (1) and sub-s. (2), because sub-s. (1) and sub-s. (2) plainly are limited to cases where five years of the term still remain to run; and it would be very strange, and, as I think, inconsistent, if sub-s. (3) is to be read so independently as, by its express terms, to exclude something which is contained or necessarily implied in the

* See pp. 329, 330, ante.

immediately preceding sub-sections in the same section. But that is not quite all. I can leave out sub-s. (4), which relates to form rather than substance, and pass to sub-s. (5)* of the same section: "Leave for the purposes of this section . . ."—not, be it observed, "for the purposes of sub-s. (3) of this section", but "for the purposes of this section"—

" . . shall not be given unless the lessor proves—(a) that the immediate remedying of the breach in question is requisite for preventing substantial diminution in the value of his reversion . . . (b) that the immediate remedying of the breach is required for giving effect in relation to the house to the purposes of any enactment, or of any byelaw . . . (c) in a case in which the lessee is not in occupation of the whole of the house, that the immediate remedying of the breach is required in the interests of the occupier . . . (d) that the breach can be immediately remedied at an expense that is relatively small in comparison with the much greater expense that would probably be occasioned by postponement . . . or (e) special circumstances which in the opinion of the court, render it just and equitable that leave should be given."

It will be noticed that every one of the paragraphs (a) to (d) inclusive is emphasising the point which I would put in the form of a question: Is the immediate remedying of this breach really called for in the proper interests of the reversioner? Not one of those paragraphs would have the slightest significance or application save where an appreciable period of the term remained unexpired, and could obviously have no possible significance where the term had been altogether surrendered. It is true that para. (e) is in perfectly general terms—"special circumstances which, in the opinion of the court, render it just and equitable . . ." But, having regard to the purposes of the Act, I cannot, for my part, see how the landlord, in a case such as this, could really apply himself to proving "special circumstances" which would "render it just and equitable . . ." Having regard to the general scope of the Act, where the lease is expired I should have thought that the court, if applied to, would be bound to give leave: the question of "special circumstances" could not, I venture to think, arise at all. And if that is right, it seems to me to follow quite plainly that sub-s. (5) is drawn on the unmistakable assumption or premise that leave will be asked for and is only requisite in cases where an appreciable part of the term of the lease remains unexpired. In other words, it is consistent, and really only consistent, with the view that the restriction is the one adumbrated by sub-s. (1) and sub-s. (2) of the section, namely, a restriction where five years or more of the lease remain unexpired. A little further support, I think, is given to that by sub-s. (6):

"The court may, in granting or refusing leave for the purposes of this section, impose such terms and conditions on the lessor or on the lessee as it may think fit."

That is a formula quite inapplicable to a case such as the present.

Finally, I would briefly refer to s. 2, which restricts the right of the lessor to recover expenses which he had a right to recover under s. 146 (3) of the Law of Property Act, 1925, and which uses the phrase "unless he makes an application for leave for the purposes of the preceding section"—again not, be it noted, "for the purposes of sub-s. (3) of the preceding section". The point is, no doubt, a small one, but it lends, I think, some force to the argument of counsel for the plaintiffs that one cannot properly interpret s. 1 in such a way as would make sub-s. (3) confer an altogether independent right on the lessee—independent,

* Certain amendments to s. 1 (5) of the Act of 1938 were effected by s. 51 (1) (c) and (d) of the Landlord and Tenant Act, 1954; these are not relevant to the present decision as the counter-notice was served in 1953.

A that is, of the restrictions adumbrated plainly enough by sub-s. (1) and sub-s. (2). In the light of all those circumstances, I have felt compelled to the view that to interpret sub-s. (3) in the sense which found favour with the learned county court judge is really to misinterpret the Parliamentary intention as found in the section read as a whole.

B We had our attention drawn to a number of passages in MAXWELL ON THE INTERPRETATION OF STATUTES (10th Edn.) (1953), and to a number of cases. It is not in doubt that support will be found for many propositions on the interpretation of statutes—not always consistent with each other—in the books, and particularly in the text-book which I have mentioned. But without in any way qualifying the general rule that the court's duty is to interpret the Parliamentary language and not to substitute for it what the court may feel would have been C a much better idea, it is, I think, legitimate and proper to read and rely on such a principle as this (MAXWELL ON THE INTERPRETATION OF STATUTES (10th Edn.), at p. 229):

D “Where the language of a statute, in its ordinary meaning and grammatical construction, leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity, hardship or injustice, presumably not intended, a construction may be put upon it which modifies the meaning of the words, and even the structure of the sentence.”

A passage was in my mind from LORD DUNEDIN's speech in *Whitney v. Inland Revenue Comrs.* (3) ([1926] A.C. 37 at p. 52), where he said:

E “A statute is designed to be workable, and the interpretation thereof by a court should be to secure that object, unless crucial omission or clear direction makes that end unattainable.”

I have come to the conclusion here that one cannot give effect to what I regard as the manifest purpose of the Act of 1938, dealing with a particular mischief, F unless one reads into sub-s. (3) of s. 1 the requisite limitation to make it consistent with sub-s. (1) and sub-s. (2). Counsel for the defendant forcefully said: “It is all very well, but what are the words you are going to read in?”; and that argument must be met. I think the answer is that the words “no proceedings”, in the context, and following, as they do, the reference to a “counter-notice . . . served . . . under this section”, must be treated as meaning “no relevant G proceedings”, or “no such proceedings”, or, put in another way, that “no proceedings . . . shall be taken” ought to be read as meaning “the proceedings contemplated in the preceding sub-sections of this section shall not be taken”. I do not shrink from the fact that my conclusion involves, no doubt, an appreciable and substantial gloss on the strict terms of the sub-section. It is only by so H interpreting them, however, that I can achieve the consistency in the sub-section which a reading of the whole section seems to me inevitably to demand; and I am comforted to this extent—that such a reading of the section cannot be condemned as wholly irrational. In *Church Comrs. for England v. Kanda* (4) ([1957] 2 All E.R. 815), which came before this court, MORRIS, L.J., used this language in reference to this section (*ibid.*, at p. 820):

I “There might, however, be circumstances in which an assignee who had gone into possession had proceeded at once to remedy all disrepair and to bring it about that the premises were in a condition that satisfactorily complied with the covenants of a lease. It might be, therefore (and it is to be remembered that the provisions now under consideration only apply where more than three years of the term of a lease remain unexpired), that a court would not necessarily be disposed to give leave to take proceedings against an assignee.”

That was a case in which the question was raised whether a judgment should be set aside because leave had not been given as against a particular party. It is, however, true to say that the particular point with which we are concerned was never debated. PEARCE, L.J., who was then sitting with MORRIS, L.J., has told us quite plainly that the matter was never in their minds. I only, therefore, refer to that passage in support of what I have said—that one cannot condemn as irrational, or on the face of it wrong, a reading of sub-s. (3) in the sense in which I would interpret it, which happens to be the way in which MORRIS, L.J., read the whole section. And MORRIS, L.J., is not, after all, entirely alone. I have earlier read* s. 51 (1) of the Landlord and Tenant Act, 1954, and it will be remembered that one of the conditions, (b), is expressed thus:

“that three years or more of the term remain unexpired at the date of the service of the notice of dilapidations or, as the case may be, at the date of commencement of the action for damages . . .”

That shows plainly enough that Parliament interpreted s. 1 of the Act of 1938—including sub-s. (3)—as only applicable in the class of case in which MORRIS, L.J., thought it only applicable, namely, where five† years or more of the term remain unexpired.

I again wish to protect myself by observing that I am fully aware that, if an earlier Act leads to a plain result or a result which the court thinks is in accordance with the proper interpretation of its terms, then one cannot twist those terms because Parliament later thought that they meant something else. Where there is a fair ambiguity it is, on the other hand, permissible (if it is otherwise justifiable) to prefer a meaning which was the meaning that Parliament later attributed to the language in another Act in *pari materia*. For these reasons, therefore, I have come to the conclusion, with all respect to His Honour, that in this case the objection taken was not well founded, and that no leave of the court was required for this particular proceeding.

Before I leave the case I ought to refer to *Cusack-Smith v. Gold* (5) ([1958] 2 All E.R. 361), which came before PILCHER, J. That was an action of a somewhat complicated kind. The substance of it was an action for damages for breach of a repairing covenant, and the plaintiff had got before the court no less than ten defendants. The tenth defendant was one who had a limited interest as a sub-lessee at the time when a notice on the landlord's part under s. 146 of the Act of 1925 and pursuant to s. 1 (2) of the Act of 1938 was served. The tenth defendant was not directly served, but the notice was apparently pinned to the premises, and the judge held that that operated as service on the tenth defendant. He (the tenth defendant) did not himself serve a counter-notice; but the ninth defendant‡—a limited company on whom the landlord's notice was directly served—had served a counter-notice. By the time that the action was commenced the tenth defendant's interest had wholly terminated, but he was joined as a defendant and sued in respect of his responsibility for the alleged breaches of covenant. He took the point that the action was not competent against him because no leave had been obtained to serve him. The learned judge rejected that view, and he interpreted the word “lessee” in the relevant parts of the Act of 1938, as amended, as excluding the tenth defendant, who, when the action started, had no interest in the premises. The case was,

* See p. 329, letter F, ante.

† I.e., applicable as originally enacted before the period of three years was substituted for five years by the Landlord and Tenant Act, 1954, s. 51 (1).

‡ The ninth defendant was the assignee of the leasehold interest in the premises of which the tenth defendant was the sub-lessee at the time when the notice under s. 146 was served.

A therefore, somewhat relied on by counsel for the plaintiffs in the present case, because when this action was started the lease was surrendered and there was, therefore, no lessee. On the other hand, the point here was different, because the defendant had served a counter-notice, which the tenth defendant in *Cusack-Smith v. Gold* (5) had not done. Therefore, as counsel for the plaintiffs conceded, this case was not of itself sufficient to carry him home. I would, for my part, prefer to express no view on the particular ground on which PILCHER, J., decided *Cusack-Smith v. Gold* (5): it is not necessary for the decision of this case and, therefore, I say no more about it, and I must not thereby be taken either as approving or as disapproving the particular construction of the word "lessee" which there commended itself to PILCHER, J. That matter can await a further occasion on which such a point must directly be decided. For the reasons which I have stated, in this most difficult and complicated case I have come to the conclusion that this appeal should be allowed.

SELLERS, L.J.: I agree that the appeal should be allowed, and I agree so fully with what my Lord has said that I have nothing of substance to add to it.

D I feel some sympathy with the learned county court judge, because it is clear that different views may be taken of this matter and he had not the advantage of having before him the judgment in *Dwellings Developments, Ltd. v. Drake* (2) ((1954), 163 Estates Gazette 192) which had been delivered by SIR BRETT CLOUTMAN, Q.C., sitting as an official referee. The helpful arguments of both the learned counsel have further revealed the difficulties involved in the interpretation of the Leasehold Property (Repairs) Act, 1938. It is a short Act, and, so far as I can see, it related only to leases where the unexpired term is five years* or more: that was the ambit of its operation. It would not be, I think, within the purpose and compass of the whole scheme to enlarge the interpretation of s. 1 (3) in the manner which has been submitted by learned counsel and was acceded to by the learned judge in the court below. I agree, as has been argued, that the words are specific, because there is no doubt that the enforcement by action for damages where the unexpired period of a lease was five years or more was restricted. Sub-section (3) definitely provided the restriction. It gave the "benefit of [the] Act", as was said in sub-s. (1) and sub-s. (2) of s. 1, to the lessee so that the proceedings mentioned could not be brought against him unless the leave of the court had been granted. But I do not find that sub-s. (3) is otherwise specific as to its time of operation when the Act as a whole is looked at. Its scheme, it seems to me, indicates that the sub-section can be invoked only when the lessor is attempting to do that which the previous sub-sections deal with—in this case to claim for damages for failure to repair when the unexpired period is as great as therein specified. Here there is, in fact, no unexpired period at all: the lease had been surrendered. I prefer the view which my Lord has stated—that the amended defence relied on in this case cannot prevail and that the action was properly constituted, and, I suppose, must be restored for consideration.

I PEARCE, L.J.: I agree with all that has been said. The serving of a counter-notice entitles the tenant to "the benefit of [the] Act". Section 1 of the Leasehold Property (Repairs) Act, 1938, as a whole, seems to make it clear that the intended "benefit of [the] Act" was that proceedings should not be brought without leave until the five-year* period started. Did the legislature, by sub-s. (3), intend to add a further somewhat irrational benefit, with no merits, in certain cases, encroaching on the whole of that five-year period? On reading

* Now three years; see footnote, p. 328, ante.

s. 1 of the Act as a whole, I cannot believe that that was intended. It is true that the words "no proceedings . . . shall be taken", in sub-s. (3), when read in isolation, seem to have that result, and I fully sympathise with the difficulties which were felt by the learned judge; but, when those words are read with the rest of the section and the rest of the Act, it becomes clear, in my opinion, that that was not their intended meaning, and that the prohibition was intended to refer only to proceedings before the five-year period. For that reason, and for the other reasons which have been so fully and clearly set out by my Lord in his judgment, I agree that the appeal must be allowed.

Appeal allowed. Case remitted.

Solicitors: *Herbert Reeves & Co.*, agents for *Kellock & Cornish-Bowden*, Totnes (for the plaintiffs); *Crane & Hawkins* (for the defendant).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

MAORI TRUSTEE v. MINISTRY OF WORKS.

[PRIVY COUNCIL (Viscount Simonds, Lord Morton of Henryton, Lord Keith of Avonholm, Lord Somervell of Harrow and Lord Denning), July 7, 8, 9, 10, October 2, 1958.]

Privy Council—New Zealand—Compulsory purchase—Compensation—Potentiality—Subdivision proposed into lots in accordance with a scheme requiring ministerial consent—Subdivision not apparent on ground at date in relation to which compensation was to be assessed—Plans for subdivision then existing but ministerial consent not established—Basis of assessment of compensation—New Zealand Finance Act (No. 3), 1944, s. 29 (1) (b).

In 1948 a plan was prepared for the subdivision of some 242 acres of Maori land. This plan required the approval of the Minister of Maori Affairs and any sale of plots of less than ten acres within the area before such consent was obtained was illegal. In July, 1948, the Maori Land Court made an order vesting the land in a trustee, but the order did not become operative until the Minister of Maori Affairs approved it in November, 1951. In September, 1951, the Minister of Works gave notice of intention to take about ninety-one of the 242 acres, and in September, 1952, a proclamation was gazetted taking the ninety-one acres and vesting them in the Crown as from Sept. 15, 1952 (the "specified date"). The trustee claimed compensation for the value of the ninety-one acres, which value by the New Zealand Finance Act (No. 3), 1944, s. 29 (1) (b), was to be taken to be the amount which the land if sold in the open market by a willing seller on the specified date might be expected to realise. At that date there was no more than a paper plan of the proposed subdivision of the 242 acres, which were not then subdivided in fact. On the question whether the ninety-one acres should be valued on the assumption that they were available for sale in subdivided lots or on the basis of the sale of the ninety-one acres as a whole,

Held: (i) compensation for the ninety-one acres should be assessed on the basis of the sale of the land as a whole, unless at the specified date (a) ministerial consent to the subdivisional plan had been obtained and (b) the subdivided parts were sufficiently apparent on survey of the ground to have enabled their immediate sale (see p. 343, letter I, post).

St. John's College Trust Board v. Auckland Education Board ([1945] N.Z.L.R. 507) disapproved.

A (ii) in assessing compensation for the ninety-one acres as a whole the land should be valued with its potentiality of being subsequently subdivided; thus the task of assessing compensation would include estimating how far the land was ripe at the specified date for subdivisional development and how soon it would in fact have been fully developed (see p. 341, letter C, post).

B Appeal dismissed.

[**Editorial Note.** The New Zealand Finance Act (No. 3), 1944, s. 29, corresponds to the Acquisition of Land (Assessment of Compensation) Act, 1919, s. 2, for which, see 3 HALSBURY'S STATUTES (2nd Edn.) 977.

C As to principles for assessing compensation under the Acquisition of Land (Assessment of Compensation) Act, 1919, see 10 HALSBURY'S LAWS (3rd Edn.) 96-98, paras. 160-163; and for cases on the subject, see 11 DIGEST (Repl.) 126, 127, 164-168.]

Cases referred to:

- (1) *Vyricherla Narayana Gajapatiraju (Raja) v. Revenue Divisional Officer, Vizagapatam*, [1939] 2 All E.R. 317; [1939] A.C. 302; 108 L.J.P.C. 51; 11 Digest (Repl.) 132, 177.
- D (2) *Corrie v. MacDermott*, [1914] A.C. 1056; 83 L.J.P.C. 370; 111 L.T. 952; 11 Digest (Repl.) 127, 165.
- (3) *St. John's College Trust Board v. Auckland Education Board*, [1945] N.Z.L.R. 507.
- (4) *Turner v. Minister of Public Instruction*, (1956), 95 C.L.R. 245.

E **Appeal.**

Appeal by the Maori Trustee from an order of the Court of Appeal of New Zealand (GRESSON, F. B. ADAMS and SHORLAND, J.J.), dated Dec. 19, 1956, on a Case Stated by the Maori Land Court for the opinion of the Supreme Court of New Zealand pursuant to the New Zealand Maori Affairs Act, 1953, s. 67. By consent, the Case Stated was removed into the Court of Appeal. The facts are set out in the judgment of the Board.

F

E. D. Blundell, Q.C. (of the New Zealand Bar), and *P. M. O'Connor* for the appellant.

The Solicitor-General for New Zealand (R. H. C. Wild, Q.C. (of the New Zealand Bar)), and *J. D. F. Moylan* for the respondent.

G

LORD KEITH OF AVONHOLM: This is an appeal from the judgment of the Court of Appeal of New Zealand on a Case Stated by the Maori Land Court relating to the basis of compensation to be awarded in respect of land taken compulsorily by the Crown under the Public Works Act, 1928.

H

It will be convenient to set out chronologically certain relevant dates and events. In 1948 a plan was prepared for the subdivision of certain Maori land of some 242 acres in extent in the neighbourhood of the Harbour at Tauranga. This plan required the approval of the Minister of Maori Affairs. Any sale of plots of less than ten acres within the area, before this consent was obtained, was illegal. Later in 1948 an application was made to the Maori Land Court for an order vesting the 242 acres in a trustee. The object was to facilitate transfers of land within the area by avoiding the need for a multiplicity of signatures. By order dated July 15, 1948, the Maori Land Court vested the land in the Waiariki District Maori Land Board (hereafter referred to as the "Maori Land Board") as trustee. This order did not become operative until approved by the Minister of Maori Affairs. On Sept. 13, 1951, the Minister of Works gave notice of intention to take about ninety-one acres of the 242 acres. In November, 1951, the Minister of Maori Affairs notified his approval of the order vesting the 242 acres in the Maori Land Board. On Sept. 11, 1952, there was gazetted a proclamation taking the ninety-one acres and vesting that area in the Crown as from Sept. 15, 1952 (hereafter called "the specified date"). On Sept. 29, 1952, the Maori

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Land Board claimed as compensation for the taking of the ninety-one acres the sum of £109,011, of which £95,711 was for the value of the land and the balance for injurious affection of other land. On Sept. 30, 1952, under the Maori Land Amendment Act, 1952, the Maori Trustee (the present appellant) came in place of the Maori Land Board. On Apr. 6, 1954, an application by the Minister of Works for ascertainment of compensation for the land taken came before the Maori Land Court. On July 11, 1955, the Maori Land Court stated a Case for the opinion of the Supreme Court of New Zealand which by consent was removed into the Court of Appeal who, on Dec. 19, 1956, gave the judgment which now comes before their Lordships' Board.

The relevant provision which governs the assessment of compensation is s. 29 (1) (b) of the Finance Act (No. 3), 1944, which is in the following terms:

"The value of land shall, subject as hereinafter provided, be taken to be the amount which the land if sold in the open market by a willing seller on the specified date might be expected to realise."

The Case Stated, after pointing out that it would have been useless for the Maori Land Board to have proceeded with the subdivision after the issue of the notice of intention to take the land, continues:

"No evidence was adduced to show when the subdivision would have been proceeded with if the Minister's approval had been granted at an earlier date. The evidence adduced did show that the carrying out of a subdivision would have involved a considerable outlay for roading, drainage and other development, and other costs of subdivision.

"Upon hearing the evidence and submissions of counsel the court has found that part of the land would have been immediately saleable at the date of the taking in lots upon a subdivision either for residential or industrial purposes, and that the balance would have been saleable in lots upon a subdivision for residential or industrial purposes from time to time over a period of years subsequent to the date of taking.

"A question of law arises as to the basis upon which the value of the land should be assessed, including the question as to whether there should be any difference in the method of assessment of the value of, First that part of the land which would have been immediately saleable in lots at the date of the taking and Secondly that part which would have been saleable in lots from time to time over a period subsequent to the date of the taking.

"The questions which are stated for the opinion of this Honourable Court are:—

"(i) Is the value of the land to be assessed upon the assumption that the claimant sold the land at the date of the taking in one undivided parcel to one purchaser desirous of acquiring it for the purpose of subdivision and sale in lots ?

"(ii) Is the value of the land to be assessed upon the assumption that the claimant sold at the date of the taking that part of the land which was then immediately saleable in lots to several purchasers in lots according to a subdivision made by him and sold the balance of the land to several purchasers in lots from time to time over a period subsequent to the date of the taking according to a subdivision made by him ? "

Certain further questions were submitted on the assumption that these two questions were answered in the negative, but it is unnecessary to refer to these for the purposes of this appeal. The Court of Appeal did not answer the questions stated specifically, but expressed their opinion in the following order:

"(i) In accordance with s. 29 (1) (b) of the Finance Act (No. 3), 1944, and subject to the other provisions of that section the function of the Maori Land Court is to ascertain as the value of the land 'the amount which

A the land if sold in the open market by a willing seller on the specified date might be expected to realise.' The specified date is Sept. 15, 1952.

"(ii) The valuation must be of the land in the state in which it is on the specified date; any potentialities shall be taken into account in assessing its value.

B " (iii) The court must contemplate the sale of the land as a whole unless on the specified date there could have been separate sales of particular portions, and there was a market for such separate portions. Only if the land had been legally subdivided at that date so that particular lots might have been sold and title given can it be said that there could have been separate sales of particular portions.

C " (iv) If the land has to be valued as a whole, the court in assessing the potentialities may take into account the suitability of the land for subdivision, the prospective yield from a subdivision, the costs of effecting such a subdivision, and the likelihood that a purchaser acquiring the land with that object would allow some margin for unforeseen costs, contingencies and profit for himself."

D Their Lordships construe the findings of fact in the Case Stated, as narrated above, as meaning that there was, at the date of the taking, no more than a paper plan of a proposed subdivision and that if the approval of this plan had been received from the appropriate Minister and the subdivision had been in fact carried out by the provision of the necessary roads, drainage, and other facilities, some of these lots could have been sold immediately for residential or industrial purposes and the balance sold in lots from time to time over a period of years subsequent to the taking. This their Lordships take to correspond to the view expressed somewhat more shortly by SHORLAND, J., where he says ([1957] N.Z.L.R. at p. 300):

E "The words 'upon a subdivision' are taken from the Case Stated, but they require some amplification. I construe the words 'upon a subdivision' as meaning upon a subdivisational scheme having received the approval of the appropriate Minister of the Crown, and having been completed to the stage at which the owner could in fact and in law sell the subdivided allotments to separate purchasers."

F Their Lordships are not clear what is involved in the content of the second question of law submitted by the Maori Land Court. If it refers to lots in fact subdivided by the owner at the date of the taking, there were no such lots. If G it refers to a notional subdivision by the owner in accordance with the development plan, their Lordships are of opinion for the reasons to be given that no valuation on such a hypothetical sale in subdivision can be entertained. It is probably because of the difficulties underlying this second question of law that the Court of Appeal thought proper to give their decision in the form in which H they did.

I It is fundamental that the land must be valued in its state at the time of the taking. Under the Act of 1944, that value is to be assessed at the amount which a willing seller might be expected to realise if the land were sold in the open market at the date of the taking. This is not necessarily the price which it would fetch because the costs of realisation will have to be taken into account. Section 29 corresponds to s. 2 of the Acquisition of Land (Assessment of Compensation) Act, 1919, in the United Kingdom which did away with the extravagant claims and extravagant awards that were frequently made under the Lands Clauses Acts and similar legislation on the view that the owner was an unwilling seller. What, in effect, is being computed is the capital value of an asset and while in the case of land it may not always be as easy to calculate this as it would be in the case of ascertaining the market price of easily realisable stocks or shares or commodities in the field of commerce, the problem does not generally present any great difficulty in the hands of competent land valuers. There are,

however, as has frequently been observed, cases where land has a potentiality which may be realisable in the foreseeable future and, if so, will give the land an added value over and above its value for the uses made of it at the time of the taking. As *Vyricherla Narayana Gajapatiraju (Raja) v. Revenue Divisional Officer, Vizagapatam* (1) ([1939] 2 All E.R. 317) shows, the task of valuing land with such a potentiality may not always be an easy one. And in such cases it is difficult to envisage a sale to more than one hypothetical purchaser who is prepared to buy the land with a view to developing and realising the benefit of this potentiality. There seems no reason, however, why this need be in all cases an inevitable assumption. If the area of land taken, for instance, is so large as to be capable of building development in the hands of separate purchasers operating in different sections of the total area more than one hypothetical purchaser could be imagined; but for purposes of valuation the result would seem to be immaterial. The value of the whole in the open market for building development would seem to be equivalent to the sum of the values of the various parts if sold separately for the same purpose. The costs to the seller might be slightly greater in the one case than in the other, and this might lead to the assumption of a slightly higher market price in cumulo in the case of a sale to a number of purchasers; but, as the costs of realisation would be a factor to be taken into account in calculating the amount realised by the owner, the results at the end of the day should be very much the same. A similar situation might exist if there had to be assumed a sale of six houses by a willing owner-seller in the open market. He could hardly be expected to sell them in a single lot to one purchaser for less than he could realise by selling them separately to six purchasers. The purpose of the transactions in the illustrations given would, of course, be different, for in the case of land of which the value has been fully realised in the hands of the owner its sale would be for the personal use of the purchaser or as an investment having profit bearing qualities and possibilities of capital appreciation, whereas in the case of land with a development potentiality the value of the land has not yet been fully realised and the land may be bought with the view, by further capital outlay, of realising this potentiality. This necessarily leads to very different considerations in arriving at an estimate of market price.

In the case of the land in question here there are, in their Lordships' view, three material factors which the compensation tribunal must have in view. First, the consent of the Minister of Maori Affairs had to be given to any sale of the land in question by the Maori Trustee under s. 8 (9) (a) of the Native Purposes Act, 1943. Secondly, the plan could not be carried into execution without the consent of the Minister of Maori Affairs or delegated authority as required by the Land Sub-division in Counties Act, 1946. Their Lordships find it unnecessary to go through the provisions of this Act, but it contains an absolute prohibition of the sale of any allotment of less than ten acres in any subdivision or the formation of any proposed road in connexion therewith unless the scheme plan has been previously approved by the Minister or delegated authority. It is clear that, as a scheme of land development, the plan, if it had ever got to the stage of consideration by the Minister, might have been very materially modified in the matter of roads, drainage, accesses, the establishment of reserves, co-ordination with adjacent areas and other respects, if it were not entirely scrapped and had to be written anew. Thirdly, there were, in fact, no subdivided lots as shown on the plan, no roads, fences, accesses, drainage or other facilities. The land was still land that had to be developed for subsequent occupation as building land.

In the case of the first of these factors, it may be easy for the compensation tribunal to assume that the consent of the Minister of Maori Affairs would have been given as this was a scheme, as their Lordships were given to understand, for the benefit of the Maoris. The second factor raises very different considerations,

- A The question whether, but for the notice to take and the subsequent taking by proclamation, the Minister would have approved of the proposed scheme clearly involves problems for the compensation tribunal on which their Lordships can only speculate and are unable to enter. It may be that all that can be affirmed is that, at the date of the taking, the land was ripe for building development to a greater or less extent under some scheme or another which would be likely
- B to obtain ministerial approval. In short, the compensation court would have to consider the likelihood of the proposed scheme being approved by the Minister, or, if not, some alternative scheme, very much as they might have to estimate the probability of some restrictions on sale, temporary or otherwise, being removed, as pointed out by LORD DUNEDIN in *Corrie v. MacDermott* (2) ([1914] A.C. 1056 at p. 1064). This all leads up to the third consideration mentioned
- C that there were, at the date of the taking, no subdivisions in fact. The task of the compensation court, as their Lordships see it, is to estimate how far the land was ripe at the date of the taking for subdivisioinal development and how soon, looking to the need of obtaining any necessary consents, the land would in fact, but for the taking, have been fully developed and to value it accordingly.

With one qualification their Lordships would agree with the following passage

D in the judgment of GRESSON, J. ([1957] N.Z.L.R. at p. 289):

“ In my opinion, in this case the land must be valued for what it in fact was on the specified date—a tract of land capable as to some, perhaps all of it, of subdivision into building allotments, and of being sold at some time and over some period in that form. That circumstance would influence a

E purchaser in his determination of price. In estimating what price a purchaser would be willing to pay, recourse may be had to an examination of the estimated gross yield from a subdivision as yet notional only, and the estimated deductions that a purchaser would have to take into account; but that is the extent to which a notional subdivision can be regarded. There must be excluded from the court's contemplation retention by the

F claimant and an assessment of what in his hands it would yield if subdivided, because that course is not open to him. At the time value has to be determined, the land was in fact not—legally speaking—subdivided so as to permit of sale piecemeal. A good deal requires to be done before there can be disposal in that manner, and as well as expenses there will be risk and delay.”

G Their Lordships would accept this as an accurate statement of the position though, in their opinion, the passage would suffer in no way if the words “ legally speaking ” were omitted. In accepting this statement of opinion, their Lordships understand the learned judge by the words “ legally speaking ” to be referring to a previous passage in his opinion where he says (*ibid.*):

H “ it is lawfully open to award compensation upon the basis of a sale to several purchasers in lots according to a subdivision, but only if in fact there is such a subdivision as would permit of this course being adopted at the relevant date.”

In the present case, the land could not, in fact, be subdivided into lots available for immediate sale without the prior consent of the competent authority, and for

I that reason it may be not inapt to refer to a subdivision either as a lawful subdivision or a subdivision in fact. But the crucial and deciding factor in their Lordships' view is a subdivision in fact which has been lawfully carried out.

In the Court of Appeal all the learned judges felt difficulty from an earlier decision of the Supreme Court of New Zealand in *St. John's College Trust Board v. Auckland Education Board* (3) ([1945] N.Z.L.R. 507). GRESSON, J., and SHORLAND, J., found reasons for distinguishing it and, it would seem, accepted it as a good decision on its special facts. ADAMS, J. thought it was wrongly decided. Their Lordships agree with ADAMS, J. It is unnecessary to examine

the facts of that case in detail. As was stated by MYERS, C.J., who gave the judgment of the court, it was common ground that the land was suitable for subdivision into allotments for building purposes and that compensation should be awarded on that basis. There was no legal impediment to a subdivision. As appears from the Case, both the claimant and the respondent submitted in evidence plans of hypothetical subdivisions of the land taken. It is clear that there was, in fact, no subdivision of the land and that the land had the potentiality of subdivision. This potentiality was estimated by witnesses as being fully realisable in a relatively short period of time. The contest between the parties was whether the value of the land should be assessed on the assumption that the owner would have made his own subdivision and would have sought to sell the resultant building sections direct to purchasers or on the assumption of a sale by the owner to a purchaser who, having purchased, subdivided the land into building allotments and marketed them. For present purposes, the material part of the court's judgment is in the passage which runs ([1945] N.Z.L.R. at p. 513):

"If then the claimant is able to show that there was a market for the subdivisions as on Dec. 15, 1942 [the relevant date], and that the subdivisions could then have been sold, it is open to the Compensation Court to award compensation upon the assumption that, on that date, the claimant sold the land to several purchasers in lots accordingly."

In their Lordships' view, this was an erroneous direction in law for the reason that there were, in fact, no subdivisions and that, to give the claimant compensation on the basis that there were, would be to give him compensation for unrealised possibilities as if they were realised possibilities.

The High Court of Australia had occasion to consider this very question in *Turner v. Minister of Public Instruction* (4) ((1956), 95 C.L.R. 245), under s. 124 of the Public Works Act, 1912 (N.S.W.), which, though couched in different language, for present purposes may be regarded as introducing the same considerations as s. 29 (1) (b) of the New Zealand Act. The land in that case was about five acres in extent and was suitable for subdivision into nineteen residential allotments but had not, in fact, been subdivided. As stated by DIXON, C.J., the case raised the precise question that arises here. He says (*ibid.*, at p. 269):

"In the case of the land in question no steps had been taken for subdivision. It was necessary to survey it, to prepare plans for subdivision, to obtain the consent of the local authority, to make streets or roads and then to place it upon the market. As the land stood it was incapable of sale in subdivision and it was necessary to make improvements or alterations in its physical condition before the subdivisional prices could be obtained. In those circumstances it could not be sold in subdivision at the time of resumption. It was not therefore possible to ascribe to the owner possession of the present value of its subdivisional potentialities on the footing that all you should do is to estimate what he would gain if he subdivided the land at a future date and reduced the result to its then present value. This means too that the conclusion is clearly right which the learned judges of the Supreme Court expressed in the passage already quoted from their judgment, viz.: '... the only sale that could be considered is a sale of the land as it was at the date of resumption, that is unsubdivided, but having the clear potentiality that it was fit for subdivision'."

The opposed questions in the case were whether the compensation for the resumption of the land was to be determined (i) by reference to a hypothetical sale of the land at a price equivalent to the net amount which the owner might have expected to realise on subdividing it and selling it in subdivision, less only an allowance for the risk of realisation, or (ii) by reference to a hypothetical sale in globo to a purchaser buying with a view to subdividing and selling in subdivision

- A and prepared to pay for the land no more than such a sum as would return to him out of the transaction an amount representing an appropriate allowance for the risk of the venture and a profit to himself. The majority of the court (WILLIAMS, J., dissenting) agreed that the first question should be answered in the negative, and, while DIXON, C.J., did not think that the second question could be answered affirmatively as a matter of law, the rest of the majority
- B members (FULLAGAR, J., KITTO, J., and TAYLOR, J.) agreed that the Supreme Court of New South Wales from whom the appeal had come had correctly answered this question in the affirmative.

- At the hearing before their Lordships' Board in the present case, appellant's counsel were faced with the difficulty that, on their submission, the land, on the assumption of its being retained for sales in subdivision by the owner, should
- C be assessed at a higher value than if it were sold to a hypothetical purchaser for similar development. In their Lordships' view, it is impossible that the land should have two values, on the hypothesis required by the statute that it is sold in the open market by a willing seller. Both KITTO, J., and TAYLOR, J., in the case just cited dealt with this point in a manner that seems to their Lordships unexceptionable. The land in the hands of the owner is just capital for whatever
- D purpose he chooses to put it. And, if he chooses to employ his capital in a subdivisional scheme, the profit he will make cannot in anticipation be taken to increase the value of the land before that profit has been realised. As KITTO, J., among other passages puts it (95 C.L.R. at p. 291):

- E "There simply cannot be a difference between the price which would be agreed upon between a businesslike purchaser and a businesslike vendor and the amount which a businesslike owner would treat himself as leaving invested in the land in the event of his deciding to retain it";

or as TAYLOR, J., says (*ibid.*, at p. 299):

- F "... the land at the relevant time was worth no more in the hands of the appellant than it would have been in the hands of some other owner who had acquired it with a view to subdivision."

The matter may be stated in another way. If the owner be regarded as a hypothetical purchaser of the land to be valued wishing to buy it for subdivision he would not be expected to pay more for it than any other purchaser buying for the same purpose.

- G In these circumstances, their Lordships' Board are unable to agree with the appellant's submissions. They consider, however, that the third head of the opinion expressed in the order of the Court of Appeal should be varied. This seems to proceed on the view taken by a majority of the court that *St. John's College Trust Board v. Auckland Education Board* (3) was correctly decided on its special circumstances and leaves it open to the compensation court to follow
- H that decision if it thinks the facts warrant it. As the view of the Board is that that case was wrongly decided and as, in any event, the Board cannot agree with the way in which this direction is expressed, their Lordships are of opinion that the direction should be as follows:

- I " (iii) 'The court must contemplate the sale of the land as a whole unless it appears that the necessary legal consents to a subdivisional plan had been given and a survey on the ground at the specified date would have disclosed that the land or some part of it was in fact so far subdivided that the subdivided parts could at that date have been immediately sold and title given to individual purchasers, in which case the parts so subdivided may be separately valued, for the purpose of arriving at the total amount of compensation.'

For the reasons given, their Lordships will humbly advise Her Majesty that the appeal should be dismissed but that the order of the Court of Appeal should

be varied in the manner above expressed. The appellant must bear the costs of A
the appeal.

Appeal dismissed.

Solicitors: *Wray, Smith & Co.* (for the appellant); *Mackrell & Co.* (for the
respondent).

[Reported by G. A. KIDNER, Esq., Barrister-at-Law.] B

RANDS v. OLDROYD. C

[QUEEN'S BENCH DIVISION (Lord Parker, C.J., Cassels and Streatfeild, JJ.),
October 14, 15, 1958.]

*Local Authority—Councillor—Disqualification for voting or taking part in
discussion on account of pecuniary interest—Pecuniary interest in any
contract or “other matter”—Direct and indirect interest—Discussion on
council’s policy regarding tenders for building contracts—Councillor
managing director and shareholder of building company which did not
intend to tender but had tendered in the past—Local Government Act, 1933
(23 & 24 Geo. 5 c. 51), s. 76 (1), (2).* D

The appellant, who was a member of a borough council, was managing
director and a shareholder holding two-thirds of the issued ordinary shares
of a private company that carried on business as builders. The company
did not normally build council houses, although from the end of the war
until 1954 they had done a substantial amount of building work for the
borough council. Since 1954 the company had not tendered for building
contracts with the council, and, in 1956, when the appellant was appointed
vice-chairman of the council’s housing and town planning committee, he
decided that in view of his appointment the company should not tender in
future for contracts with the council. The company could have changed
this policy and tendered for the council’s building work. The company’s
decision was not recorded, and the borough council were not informed of it.
In July, 1957, it was proposed at a meeting of the borough council that where
the council were required by their standing orders to obtain tenders, the
borough engineer should submit a tender, and, if necessary, the direct labour
force should be increased to implement this policy. The proposal was con-
sidered and discussed at a later council meeting when an amendment was
put forward to delete the proposal to increase the direct labour force and
to allow the borough engineer to submit a tender where his staff was
adequate, as was the existing practice. At this meeting the appellant
spoke in favour of the amendment. Section 76 (1)* of the Local Government
Act, 1933, prohibits a member of a local authority who has a direct or
indirect pecuniary interest in “any contract proposed contract or other
matter” from taking part in the discussion of the matter at a meeting of
the local authority. The appellant sincerely believed that the company
would not tender for building work on council houses. On appeal against
his conviction of an offence against s. 76 (1), E
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Held: the appellant was rightly convicted since, as the company were
in a position to tender for building contracts with the council if they had
wished, they had a direct pecuniary interest in the matter discussed at the
meeting, viz., the policy of the council regarding tenders, and that matter
was an “other matter” within the words “any contract . . . or other

* For the terms of s. 76 (1) and (2), see pp. 346, 347, post.

A matter" in s. 76 (1) of the Local Government Act, 1933; therefore, the appellant had, by virtue of s. 76 (2)*, an indirect pecuniary interest in the matter discussed at the council meeting.

Brown v. Director of Public Prosecutions ([1956] 2 All E.R. 189) considered and applied.

Appeal dismissed.

B [As to disqualification for voting or taking part in discussion, see 24 HALSBURY'S LAWS (3rd Edn.) 447-449, para. 840.

For the Local Government Act, 1933, s. 76 (1), (2), see 14 HALSBURY'S STATUTES (2nd Edn.) 395, 396.]

Cases referred to:

C (1) *Nutton v. Wilson*, (1889), 22 Q.B.D. 744; 58 L.J.Q.B. 443; 53 J.P. 644; 33 Digest 10, 16.

(2) *Brown v. Director of Public Prosecutions*, [1956] 2 All E.R. 189; [1956] 2 Q.B. 369; 120 J.P. 303; 3rd Digest Supp.

Case Stated.

D This was a Case Stated by justices for the County of the Isle of Ely in respect of their adjudication as a magistrates' court sitting at the Court House, Lynn Road, Wisbech. On Feb. 5, 1958, an information was preferred against the appellant, Leslie Harry Rands, by the respondent, Donald Oldroyd, alleging that the appellant, who was a member of Wisbech borough council, on Sept. 27, 1957, having an indirect pecuniary interest in the matter for consideration at a meeting of the council, took part, contrary to s. 76 of the Local Government Act, 1933, in a discussion of the said matter at a meeting of the borough council.

E The justices found the following facts. The appellant was managing director of, and held two hundred of the three hundred ordinary issued shares in, Henry Rands & Son, Ltd. (referred to hereinafter as "the company"), a private company which carried on business as builders at Wisbech. In May, 1950, the appellant was elected to the Wisbech borough council (referred to hereinafter as "the council"), and he was also president of the Wisbech branch of the Federation of Building Trades Employers. The company did not normally build council houses but after the last war they were encouraged by the council to tender for building contracts and through the appellant's efforts as president of the Federation bulk contracts were made with the council under which local builders, including the company, took part in building council houses.

G 1945 the company had taken part in nine such building contracts for which they were paid £114,299. No further tenders to the council were made by the company after August, 1954, and in 1956, when the appellant was appointed vice-chairman of the housing and town planning committee of the council, he decided, in view of his appointment, that the company would not tender in future for any building contracts for the council. This decision was not recorded

H nor were the council informed of it. The council's rules regarding contracts were set out in their standing orders, order 3 of which provided that no contract exceeding £500 should be made unless either public notice had been given in certain newspapers to enable people to tender, or invitations to tender had been sent to selected persons. In July, 1957, a motion was proposed at a meeting of the council that

I "Where it is required that tenders shall be obtained in compliance with standing order 3 . . . the borough engineer shall submit a tender on behalf of his department for any contract that he feels may be within the scope of that department, and, where necessary, the direct labour force be increased in order to implement this policy."

The motion was considered by the general purposes committee on Sept. 16, 1957, who reported that they did not consider it desirable to increase the direct labour

* For the terms of s. 76 (1) and (2), see pp. 346, 347, post.

force and, accordingly, when the motion was considered by the council on Sept. 27, 1957, it was suggested that it should be amended by, in effect, allowing the borough engineer to tender, as he had always done, but deleting from the motion the words which enabled him to increase the direct labour force and thereby to bring more work within the scope of his department. During the discussion of the proposed amendment by the council, when the appellant was speaking in favour of the amendment, objection was taken to his speaking by another councillor on the ground that the appellant had an interest in the matter which he should have declared; differing opinions were then expressed by other councillors on this point, but the appellant continued to speak in favour of the amendment, pointing out that it was undesirable for the council to take on extra labour and the difficulties arising when the particular work for which they had been taken on had ended. The company was at all times in a position to be invited to tender for building work for the council and to tender for such work in the future if they desired.

For the respondent it was contended that the motion before the council affected local builders because, if passed, it would increase competition from the borough engineer for tenders for building work; that the company had a direct pecuniary interest in the motion within s. 76 (2) of the Act of 1933, and that the appellant had an indirect pecuniary interest therein within s. 76 (1), since he was managing director and a shareholder of the company. For the appellant it was contended that s. 76 only applied where a member of a local authority had an existing pecuniary interest in the "contract or proposed contract or other matter" discussed and not merely an interest which might arise in the future; that an interest in an "other matter" within s. 76 (1) meant an interest in a specific transaction or matter whereas the matter discussed in the present case concerned general policy; that "interest" meant a legal or equitable right in the matter discussed; that, on the facts, the company had no direct interest in the motion discussed and, therefore, the appellant had no indirect interest in it and accordingly, no offence had been committed under s. 76. Both parties relied on *Brown v. Director of Public Prosecutions* (2) ([1956] 2 All E.R. 189).

The justices were of opinion that, although the appellant had acted sincerely and in an open and honourable manner throughout, nevertheless, as the company could have tendered for building work at any time, the appellant had committed an offence under s. 76. The justices granted the appellant an absolute discharge. The question stated for the opinion of the High Court was whether the justices came to a correct decision in law.

Roy Wilson, Q.C., and *Gerald Kidner* for the appellant.
S. A. Morton for the respondent.

LORD PARKER, C.J.: Let me say at once that there is no question of any corruption or dishonesty in any sense of the word in this case. Indeed, the justices found that the appellant was sincere, that he had throughout acted openly and honourably, and, although they felt bound to convict him, they gave him an absolute discharge. Nevertheless the appellant appeals to this court saying that he was guilty of no offence and it may be that this is of interest not only to him but to councillors generally.

[His LORDSHIP then stated the facts as set out in the Case Stated and continued:] Section 76 of the Local Government Act, 1933, so far as it is relevant, is in these terms (sub-s. (1)):

"If a member of a local authority has any pecuniary interest, direct or indirect, in any contract or proposed contract or other matter, and is present at a meeting of the local authority at which the contract or other matter is the subject of consideration, he shall at the meeting, as soon as practicable after the commencement thereof, disclose the fact, and shall not take part

- A in the consideration or discussion of, or vote on any question with respect to, the contract or other matter.”

Then there is a proviso which has not been relied on in this case, and I do not think that it is necessary to read it. Then by sub-s. (2) of s. 76 it is provided:

- B “For the purposes of this section a person shall (subject as hereafter in this sub-section provided) be treated as having indirectly a pecuniary interest in a contract or other matter, if—(a) he or any nominee of his is a member of a company or other body with which the contract is made or is proposed to be made or which has a direct pecuniary interest in the other matter under consideration.”

- C By sub-s. (6) of s. 76 failure to comply with the provisions of sub-s. (1) is made an offence.

It is clear, therefore, that the member of the council concerned, namely, the appellant, can only have an indirect pecuniary interest in this case if the company itself has a direct pecuniary interest. Therefore, one can limit the matter to this: Did Rands & Sons, Ltd., in the circumstances of this case have a direct

- D pecuniary interest in any contract or proposed contract or other matter which was the subject of discussion at the meeting? There is no question here of any contract or proposed contract. If the company had a direct pecuniary interest it was because they had a direct pecuniary interest in an “other matter”, and what is said is this, that the matter under discussion was a matter which, to put it generally, seriously affected the company in a pecuniary way in that if
- E the original motion was carried the competition of the borough engineer might well be such as to prevent the company if they tendered from ever getting a contract. It is said that accordingly they had a financial interest and a direct financial interest in the matter to be discussed and which was discussed at that meeting.

- F The first matter, and I think the all-important matter here, is to consider the mischief aimed at by s. 76. One can say it is obvious, and indeed it is. It was put by LORD ESHER, M.R., in *Nutton v. Wilson* (1) ((1889), 22 Q.B.D. 744 at p. 747), a case considering a rather similar provision in the Public Health Act, 1875, in these words:

- G “I adhere to what I have before said with regard to provisions of this kind. They are intended to prevent the members of local boards, which may have occasion to enter into contracts, from being exposed to temptation, or even to the semblance of temptation.”

LINDLEY, L.J., in the same case (*ibid.*, at p. 748) said:

- H “To interpret words of this kind, which have no very definite meaning, and which perhaps were purposely employed for that very reason, we must look at the object to be attained. The object obviously was to prevent the conflict between interest and duty that might otherwise inevitably arise.”

- I That is quite clearly the object of s. 76 of the Act of 1933, and whereas consideration of the mischief aimed at does not enable the court to construe the words in a wider sense than they appear, it at least means this, that the court would not be acute to cut down words otherwise wide merely because this was a penal statute. Counsel for the appellant in his very able argument has contended that nevertheless these words, “having a direct pecuniary interest in any contract or proposed contract or other matter”, are not as wide, properly construed, as one would otherwise think. He relies in particular on the words “or other matter”, and he says that whether one looks at the matter as a case of *eiusdem generis* or of *noscitur a sociis*, at any rate “other matter” must be something confined to what he would say was a specific transaction and not a

matter of what might be said to be general policy. Apart from relying on that principle he also points out that in the Municipal Corporations Act, 1882, which was repealed by the Act of 1933, the original corresponding section to s. 76 of the Act of 1933, s. 22 (3) of the Act of 1882, was in these terms: A

“ A member of the council shall not vote or take part in the discussion of any matter before the council, or a committee, in which he has, directly or indirectly, by himself or by his partner, any pecuniary interest.” B

He points out that that is quite general ; there is no reference there to a specific contract or proposed contract, and he invites the court to say that s. 76 was intended to be a limitation on what heretofore had been a very general provision. Speaking for myself, I find it impossible to give any satisfactory narrower meaning even if I were so minded to those words “ any contract or proposed contract or other matter ”. I do not propose to go through the number of illustrations which have been canvassed in this court, but the more one does consider the matter the more difficult I think it is, even if one were so minded, to cut down those words “ or other matter ” to something which was definable and which was a limitation on what appear to be general words. Bearing in mind the mischief aimed at by this Act, I do not think those words are to be read in other than a very general way, and I see no ground for introducing a limitation which, as I said, is one which cannot satisfactorily be defined. C D

Counsel for the appellant also pointed out, quite rightly, that if one construes s. 76 in a very wide way, business at council meetings may be made impossible, it may stultify the whole proceedings, and that he invokes as another ground for cutting down the general meaning of those words. I quite appreciate that argument and the force of it, but I think that the limitation to be found in s. 76 is not in regard to those words “ in any contract or proposed contract or other matter ” but in the consideration whether the person under consideration—and here I am considering the company and not the appellant—had a direct pecuniary interest. I think the limitation is to be found in that word “ direct ” as opposed to a pecuniary interest which is too remote. In the present case I, for my part, am quite satisfied that the company did have a direct pecuniary interest and that that interest was not too remote to bring them within the words of the section. All these cases, of course, must be determined ultimately on their particular facts, but some help is to be gained, I think, by a consideration of the only one of two cases which have come before this court, namely, *Brown v. Director of Public Prosecutions* (2) ([1956] 2 All E.R. 189). The question debated there was as to lodgers' allowances to be paid by tenants of council houses, and three of the councillors who were on the council considering this matter were in fact tenants of council houses, albeit they had not any lodgers. The court also went on to consider and contrast the position of those councillors who had not yet got council houses but might at some time apply for them. The court were clearly of opinion that those councillors who were already tenants, albeit they did not have lodgers as yet and might never have lodgers, did have a pecuniary interest in the contract because in that case they would have a contract of tenancy, or rather a proposed contract of tenancy because this would alter the existing contract. The court were clearly of opinion that they had a pecuniary interest in the contract, and they contrasted the position of those councillors who might become tenants of a council house in the future but who as yet had not become tenants. It is enough, I think, to refer to two passages in the judgment of LORD GODDARD, C.J., first where he said that Parliament had laid down that on any matter in which a member of a local authority had a pecuniary interest—and he undoubtedly had a pecuniary interest if he was paying rent for a house owned by the council—he should E F G H I

A not vote at all. A little further on ([1956] 2 All E.R. at p. 191), LORD GODDARD, C.J., refers to what might be thought to be anomalies; he says:

B “It is perfectly true to say that anomalies may occur, if they are really anomalies, though I do not think they are, e.g., councillors might vote on those matters knowing perhaps that in a fortnight’s time or a month’s time they themselves would be the occupiers of council houses and pay rent. One cannot deal with every point that arises, but if a person occupies a council house, I think he is debarred by the terms of the sub-section [sub-s. (1) of s. 76] from voting . . .”

Again, DONOVAN, J., in his judgment ([1956] 2 All E.R. at p. 192), after stating

C “The object of s. 76 (1) is clearly to prevent councillors from voting on a matter which may affect their own pockets and, therefore, may affect their judgment . . .”,

goes on at the foot of p. 192 to say:

D “. . . I am referring to the others who had not taken in lodgers or sub-let. They each had a [council] house which was a potential income-producing asset, and their case is different from that of the councillor who merely had a hope of getting a house in future.”

The facts there were quite different. As I have said, what was being considered was a contract of tenancy, but for my part I think that the relevance of it is that the limitation there suggested, namely, the limitation in the case of councillors who had not yet got tenancies, was that the court were making the very point which I am trying to make, namely, that one has to consider whether the pecuniary interest was direct or remote. They were really saying that the interest of councillors who had not a council house was too remote, whereas those that did have a council house came within the words of the section. For my part I think that in this case the company clearly had a

F direct pecuniary interest in the matter under discussion.

Finally, I should say this. The justices found not only that the company had not tendered since 1954 but also that the appellant himself had decided that in view of his holding the position which he held, namely, as vice-chairman of the housing and town planning committee of the council, his company would not tender in the future for any building contracts of the council. Further,

G the justices found in the last paragraph of the Case:

“We were of the opinion that the appellant was sincere in his statement to us that his company did not intend to tender for any further council work.”

H For my part, I cannot think that that can affect the question whether an offence has been committed or has not been committed. It goes very clearly to mitigation but not to the offence, because at any time the appellant and the company could have changed their minds and tendered. It is a matter which the justices very properly took into consideration in passing sentence and, as I have said, they gave what I think is a very appropriate sentence in this case, namely, an absolute discharge. In my view, the justices, who dealt very ably with a difficult

I case, came to a correct decision, and I would dismiss this appeal.

CASSELS, J.: I agree. I do not propose to go into the facts of the case but rather to deal with the matter generally. Parliament has, certainly since 1882, desired to deal with the case of any member of a council who votes or takes part in the discussion of any matter, before the council or committee, in which he has directly or indirectly by himself or his partner any pecuniary interest. That desire was continued under s. 76 of the Local Government Act, 1933, which provides:

"If a member of a local authority has any pecuniary interest, direct or indirect, in any contract or proposed contract or other matter, and is present at a meeting of the local authority at which the contract or other matter is the subject of consideration . . ."

he must as early as he can disclose the fact, take no part in the consideration and discussion and record no vote on any question with respect to the contract or other matter. There is no doubt that the mischief Parliament is aiming at is that members of a local authority should not be, if they have any pecuniary interest direct or indirect, taking such a part in the discussion or voting which might indicate to the public that they were not acting in the public interest but rather in their own private interest. It is no answer to say that the particular councillor had no pecuniary advantage to obtain by recording his vote. That particular phase of the matter was discussed by DONOVAN, J., in *Brown v. Director of Public Prosecutions* (2) ([1956] 2 All E.R. 189 at p. 192) when he said, referring to the circumstances of that case:

"In those circumstances, no narrow construction ought to be put on the words 'pecuniary interest' in their context in s. 76 (1); in particular they ought not to be construed—and the contrary has not been suggested—as meaning pecuniary advantage."

The whole object seems to me to be that Parliament requires that members of a local authority, when there comes before that local authority a matter in which they have a peculiar interest which is pecuniary, shall restrain themselves and follow the requirements of s. 76, that is, disclose that fact and not take part in the discussion or vote on any resolution. One can well see that the confidence which the public has in local administration would be seriously jeopardised if it was thought that a councillor or a group of councillors put their heads together in order to get an advantage by reason of their pecuniary interest direct or indirect in the matter which was under discussion.

I am sure that the court has been very much obliged to counsel for the appellant for the well-phrased submissions which he has made to the court on this rather difficult question. Also I know that many illustrations can be put forward which perhaps are a little difficult at times to answer, but on the matters that have been mentioned in the course of this case I have no difficulty in arriving at the conclusion that the justices dealt with this matter most efficiently. They convicted, as they were entitled to do, on what was put before them and they mitigated by giving an absolute discharge. I also agree with what has been said by my Lord with regard to the appellant in this case. There is no suggestion against his honesty in the matter. He can return to Wisbech, if he should happen to be here, feeling that at any rate this matter has been well and thoroughly ventilated and that not a word could be breathed against him for the part which he took when this matter was before the council, but unfortunately he did have what can be rightly regarded as a pecuniary interest direct or indirect and he should have taken no part at all in the discussion. Councillors, if I may express a personal opinion, are better absent when these matters come before their local authority. I agree with the judgment of my Lord.

STREATFEILD, J.: I also agree, although I confess that I have been much impressed by the argument of counsel for the appellant as well as fully indorsing the decision of the justices referred to by my Lord that the appellant in the attitude which he took was acting perfectly openly and honourably. One is glad that that was reflected in the absolute discharge which the justices gave him though they felt obliged to record a conviction. But it is for this court to interpret the words of the legislature against the background of what is obviously the mischief aimed at.

Section 76 of the Local Government Act, 1933, is the successor of s. 22 of the

A Municipal Corporations Act, 1882, which was repealed by the Act of 1933. In s. 22 (3) of the Act of 1882 the words were as wide as could possibly be that

“ A member of the council shall not vote or take part in the discussion of any matter before the council, or a committee, in which he has, directly or indirectly, by himself or by his partner, any pecuniary interest.”

B Those words are as wide as possible. The corresponding words in the repealing Act of 1933 are:

“ If a member of a local authority has any pecuniary interest, direct or indirect, in any contract or proposed contract or other matter . . .”

C It is argued that the insertion before the words “ other matter ” of “ in any contract or proposed contract ” cuts down and narrows in some way the meaning of the words “ other matter ”. I cannot think that was the intention of Parliament and, as it seems to me, the words “ other matter ” have no less wide a meaning than they did under the Act of 1882. The test, therefore, is whether the councillor has directly or indirectly a pecuniary interest in the matter under consideration. It is to be implied under s. 76 (2) that he has such an indirect interest if he is a member of a company with which a contract is made or is proposed to be made or which has a direct pecuniary interest in the other matter under consideration. It seems to me that the sole question in this case is, whether the appellant's company had a direct pecuniary interest in the matter which was under discussion, viz., that in future the borough engineer should be empowered, indeed, as originally moved, should be obliged, to tender for any building contract in the future. Although the appellant's company, under his direction in 1956 when he became vice-chairman of the housing and town planning committee, had decided that in future they were not going to tender for any building contracts for the local authority, they had in fact done work until 1954. Although they had so decided that they would not tender in future, it was at all times open to that company as an existing building firm to reverse that policy and when a tender was advertised under the standing orders there was no reason why they should not make a tender in competition with others. In those circumstances, it seems to me that that company so long as it was a building company and was in a position to tender, had a direct pecuniary interest in matters concerning building contracts by reason of this motion, which would have the effect of the borough engineer tendering in competition with other building contractors. So that in those circumstances it does seem to me that the appellant himself having indirectly a pecuniary interest in the company and that company having a direct pecuniary interest in the matter under discussion, came within the words of s. 76. For those reasons, therefore, in my view the interpretation which the justices put on this section was the correct one.

I would like to add a word or two with regard to *Brown v. Director of Public Prosecutions* (2) ([1956] 2 All E.R. 189), to which my Lord has referred. That case was concerned under s. 76 with certain councillors some of whom were actually tenants of the corporation and had lodgers and with three other councillors who were existing tenants of the corporation who had not got lodgers. It was held in that case that both lots of councillors had a pecuniary interest in the matter which was in that case under discussion. As DONOVAN, J., put it, even those tenants who had no lodgers nevertheless had a potential income-producing asset; in other words being holders of an actual contract they could at any time if they liked have taken a lodger and having that tenancy it was a potential income-producing asset. Both LORD GODDARD, C.J., and at any rate by inference DONOVAN, J., contrasted the position of such tenants with members of the

council who were not yet tenants and indeed who might never become tenants. I cannot help thinking for myself that in so far as the phrases used by LORD GODDARD, C.J., and DONOVAN, J., in that case dealt with councillors who were not yet tenants at all, they cannot be regarded as being obiter but were necessary for the decision of the case. Speaking for myself and without deciding it because the matter has not been fully argued I would be inclined to think that councillors who were not yet tenants of council houses were in fact excepted by the proviso* to s. 76 (1) because they were inhabitants. That matter was not argued and the court in *Brown v. Director of Public Prosecutions* (2) held that the proviso did not apply, not on that ground but on the ground that housing was not a public service within the meaning of the proviso, which of course it clearly was not.

In my view, the real key to this case may be found in the concluding words of DONOVAN, J., in referring to those councillors who had houses but no lodgers when he said ([1956] 2 All E.R. at p. 192):

“ . . . their case is different from that of the councillor who merely had a hope of getting a house in future.”

In other words as inhabitants they might hereafter apply for a council house which might be or might not be granted; at any rate they would be entitled to ask for one. Here it was an existing building firm in the locality. It had in fact done work for the council until 1954. It was at all times in a position to tender for any building contracts or proposed contracts which might be invited, and in spite of the fact that their policy had been altered for the time being by the appellant it was at all times open to them to reverse that policy and tender in the future. For those reasons, therefore, I think that they had more than a hope of obtaining such a contract in the future; indeed, they had a positive right to tender for it when the tender was advertised. For those reasons, therefore, I do not think this case is governed in any way by *Brown v. Director of Public Prosecutions* (2) and in my judgment, after further thought, I have come to the conclusion that the justices were correct in their decision.

Appeal dismissed.

Solicitors: *Rider, Heaton, Meredith & Mills*, agents for *Dawbarn, Barr & Knowles*, Wisbech (for the appellant); *Director of Public Prosecutions*.

[Reported by WENDY SHOCKETT, Barrister-at-Law.]

PRACTICE NOTE.

Divorce—Practice—Trial—Circuit—Trial of matrimonial causes on circuit.

The President, after consulting the Lord Chief Justice, has directed that matrimonial causes remitted for trial from one divorce town to another are to be entered in the list at the later town in order of setting down and are, unless a judge in person otherwise directs, to come on for trial accordingly, a cause originally set down for trial at the later town taking precedence over a remitted cause set down elsewhere on the same date.

B. LONG,

Senior Registrar.

Oct. 23, 1958.

* The proviso to s. 76 (1) reads: “ Provided that this section shall not apply to an interest in a contract or other matter which a member may have as a ratepayer or inhabitant of the area . . . or to an interest in any matter relating to the terms on which the right to participate in any service, including the supply of goods, is offered to the public.”

A Re TOBACCO TRADE BENEVOLENT ASSOCIATION.
SINCLAIR (BARON) AND OTHERS v. FINLAY & CO., LTD.
AND ANOTHER

[CHANCERY DIVISION (Harman, J.), July 1, 1958.]

B *Charity—Unincorporated association—Rules—Alteration—No express power to alter rules—Whether rules could be altered by resolution of general meeting of members.*

An unincorporated benevolent association was formed in 1860 for the purpose of relieving necessitous members of a trade by granting pensions or other relief. The rules did not contain provision for their alteration nor for investment of funds except a provision that no part of the capital investments in the names of the trustees should be expended without the concurrence of a majority of shareholders in general meeting. It was assumed that the rules could be altered and in 1871 a rule was added requiring a month's notice of a proposal for alteration of rules to be given before the annual general meeting. In 1894 a rule was added by resolution that funds not immediately required might be invested in trustee investments or such securities as a committee should approve, provided that the approval of the donors should be asked at each annual general meeting. In 1956 a resolution to substitute a new rule enabling the committee to invest outside the trustee range of investments was passed at a general meeting of the association.

E **Held:** the alteration of the rules approved at the meeting in 1956 was invalid because the association never had been able by resolution validly to confer on itself power to alter its rules, except possibly by the concurrence of every member of the association; it could not, therefore, validly extend the range of investment for its funds beyond that authorised for trustee investments.

F [**Editorial Note.** An alteration of rules, in such a case as this, can validly be effected by a scheme made by the Charity Commissioners (see p. 355, letter D, post). The commissioners' powers are similar to those of the court (see generally 4 HALSBURY'S LAWS (3rd Edn.) 312, 313, paras. 641, 642, and compare as regards the jurisdiction of the court, *ibid.*, pp. 309 et seq.). An instance of a scheme sanctioned by the court widening the range of investments of the funds of a charity will be found in *Re Royal Society's Charitable Trusts*, [1955] **G** 3 All E.R. 14, 17.

As to the alteration of the rules of an unincorporated association when the relationship between members is contractual, see 5 HALSBURY'S LAWS (3rd Edn.) 259, 260, paras. 608, 610.

As to unincorporated bodies formed for charitable purposes, see 4 HALSBURY'S LAWS (3rd Edn.) 271, para. 563 (formation), pp. 383, 384, para. 798 (contractual liability).]

H **Adjourned Summons.**

The plaintiffs, the trustees of an unincorporated charity, by their originating summons, dated Sept. 17, 1957, asked for the determination of the following questions: (i) whether a resolution passed at the annual meeting of the donors and subscribers duly convened and held on July 5, 1956, empowering the trustees to invest surplus money, *inter alia*, in non-trustee securities was valid; (ii) in case the resolution was not valid the charity might be authorised by way of scheme under the Charitable Trusts Act, 1853, s. 29, or under the inherent jurisdiction of the court to invest its endowments in any manner authorised under the aforesaid resolution.

L. H. L. Cohen for the plaintiffs, the trustees.

J. E. Vinelott for the first defendant, a subscriber.

Denys B. Buckley for the Attorney-General.

HARMAN, J.: The Tobacco Trade Benevolent Association has been in existence since 1860: it is and always has been an unincorporated body. I find in its minute book a copy of the rules, printed in 1860. The rules are divided into two parts, one called rules and the other bye-laws and regulations, but nothing turns on the dichotomy. The objects of the association, as originally stated, were to relieve the necessitous honest members of the trade, their widows and orphans, by pensions, temporary relief or otherwise, and there was provision for who should be members of the association. No rule provides for any alteration of the rules; nor is there any rule about investment until one comes to the bye-laws and regulations where, by No. VII,

“No part of the capital investments made in the name of the trustees shall be expended except with the concurrence of the majority of shareholders assembled in a public general meeting.”

Thus one has a body of rules and a bye-law which assumes that there will be, or may be, invested funds of the association. They could be of two sorts, either savings or surplus moneys, or funds given to the association by way of endowment so that the capital could not be spent. Which of the funds of this association are of the one sort and which of the other does not appear, and perhaps could not now be ascertained.

The association started life in the belief that it could alter its rules as it chose, and one finds that as early as 1861 alterations were proposed in general meeting and there passed by simple majority of the attending subscribers. So the matter went on until 1871, when it seems to have occurred to somebody that the rules were being altered rather too casually. Then one finds in the 11th annual report proposals for further alterations of the rules and for an additional rule in these terms:

“That previous to the alterations of or additions to the existing rules, bye-laws and regulations, one month's notice in writing shall be given to the secretary of such intended alteration or addition prior to the annual meeting to be held in April, to be then decided by a majority of the subscribers and donors present.”

The ensuing annual meeting purported to adopt an additional rule in those terms which was then styled rule No. 24.

The surplus funds and endowments of the association were invested in 2½ per cent. annuities until 1894, when it was apparently the desire of the then governing body of the charity to extend the range of its investments. The desire was to invest in colonial securities to bring in 3½ per cent. and the association, being advised by its counsel that it was probably restricted to investments authorised by the then recent Trustee Act, 1893, determined to have recourse to its assumed power to alter its rules and widen its investment range. At the meeting on Apr. 5, 1894, a rule was passed that:

“Investments of any capital not required for the immediate purpose of the association may be in or upon any of the securities authorised by the Trustee Act, 1893, or upon such securities as shall be approved by the committee provided always that at each annual general meeting the approval of the donors be asked.”

The rule was that if the donors or subscribers did not approve, then outside investments must be sold and the proceeds re-invested in accordance with the Trustee Act, 1893. With the assent of the general meeting investments might be outside the trustee range. So the matter seems to have gone along with various small alterations until 1956.

I have before me the rules of 1956. In those rules the investment power has been somewhat cut down. Securities must be those authorised by the Trustee Act, 1925, except in cases of endowments given with special directions for investment. Under the modern r. 60, there is the same reference to alterations as existed in

- A 1871. At the meeting in 1956, it was proposed to the subscribers and donors that the investment range of the trustees should be altogether wider. The proposal put before the meeting and passed at it was that r. 49, which deals with investments, should be rescinded and that a new rule should be substituted for it that the committee might invest in any securities quoted on the London or New York Stock Exchange, whether or not authorised by the Trustee Act, 1925.
- B It is suggested that the association had power so to do by virtue of its right to alter its rules.

The present summons starts by asking the court the question whether that was a valid alteration. In my opinion, it plainly was not. This body started with no power to alter its rules, and such a body cannot alter its rules by its own motion except possibly by the concurrence of every member of the body. There never

C was any pretence that anything of that sort was obtained here. In 1860, those who had control of this body thought that they could alter their rules as they pleased. The alteration made in 1871 did not purport to confer a power of alteration, but to curb a power of alteration which was presumed to exist. In my judgment it did not exist and, therefore, the new rule adopted in 1871 is a mere nullity. It is said that the rule has been so long acted on and must have

D been so well known to those who subscribed and those who gave legacies over so many years, that it ought now to be considered as a rule of the association. In my judgment that is not so. Those in control wrongly assumed that there was power to alter when there was no power to alter and, therefore, the alterations have always been invalid alterations. If that is awkward for the association, they have an easy remedy in their hands. They can go to the Charity Commis-

E sion and get a proper scheme setting their house in order. I do not suppose any harm has been done, but a charity, unless empowered by its rules, cannot go outside investments authorised by law. In that respect the Court of Chancery used to follow the rule as to funds lodged in court, which were always put into three per cent. bank annuities because the Court of Chancery considered that they were the only investments in which a trustee might invest without loss. Statutory

F provision was first made by Lord St. Leonard's Act in 1859. Ever since that time statutes, ending with the Trustee Act, 1925, have enlarged the rights of trustees to invest so that trustee investments now cover quite a wide range. Any charity, however, which has not specific powers to invest outside that range cannot invest funds outside it, and it certainly cannot, in my view, confer on itself by a mere resolution a power, first to alter its own rules, and second, to widen the terms of

G an investment clause. Whether, if in the beginning the rules had provided a power to alter them, the body could then make use of that power to widen its investment capacity is a wider and larger question on which it is not necessary here to embark. My impression is that no such alteration can be made, but I do not so decide here because it is not necessary for me to do so. This association started with no power to alter its rules and, therefore, has no such power and

H never has had, and, that being so, to purport to pass a resolution empowering the body to invest outside the trustee range is ultra vires and invalid.

Declaration accordingly.

Solicitors: *Birkbeck, Julius, Coburn & Broad* (for the plaintiffs and first defendant); *Treasury Solicitor*.

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

LUND v. THOMPSON.

[QUEEN'S BENCH DIVISION (Lord Parker, C.J., Streatfeild and Diplock, JJ.), October 20, 21, 1958.]

Road Traffic—Notice of intended prosecution—Withdrawal—Intimation by police, subsequent to notice, stating that no further action would be taken—Further subsequent intimation that a prosecution would be instituted—Whether original notice still effective to enable court to convict—Road Traffic Act, 1930 (20 & 21 Geo. 5 c. 43), s. 21 (c).

On Feb. 11, 1958, a motorist was involved in a traffic incident. On Feb. 14, 1958, a notice of intended prosecution under s. 11 and s. 12 (1) of the Road Traffic Act, 1930, for dangerous and for careless driving, given on the direction of the Commissioner of Police of the Metropolis, was sent to the motorist pursuant to s. 21* of the Road Traffic Act, 1930. On Feb. 27, 1958, a letter written on the direction of the commissioner and stating that "after careful consideration the police have decided not to take any further action in the matter" was sent to the motorist. On Mar. 13, 1958, a third letter, written on the direction of the commissioner, was sent to the motorist; this stated that after further consideration the commissioner had decided to prosecute. At the hearing of the informations preferred by the police the motorist contended that s. 21 had not been complied with in that the notice of intended prosecution had been withdrawn by the letter of Feb. 27. This contention having failed, he pleaded guilty and was convicted.

Held: the notice of intended prosecution having been duly given, subsequent intimation by the police that they did not intend to prosecute would not nullify the notice, since it remained open to any member of the public to prosecute; therefore there was jurisdiction to convict the motorist.

Appeal dismissed.

[As to notice of intended prosecution for road traffic offences, see 31 HALSBURY'S LAWS (2nd Edn.) 680, para. 1008; and for cases on the subject, see 42 DIGEST 871, 201-205.]

For the Road Traffic Act, 1930, s. 21, see 24 HALSBURY'S STATUTES (2nd Edn.) 594.]

Case Stated.

This was a Case Stated by PAUL BENNETT, Esq., a metropolitan magistrate, in respect of his adjudication as a magistrates' court on Apr. 18, 1958, at Marlborough Street Magistrates' Court.

The question for the opinion of the High Court was whether he had been correct in law in holding that a notice of intended prosecution dated Feb. 14, 1958, and served on the appellant, Richard Irvin Lund, pursuant to s. 21 (c) of the Road Traffic Act, 1930, was not invalidated by subsequent events. On that determination having been made the appellant, who was charged with driving in a manner dangerous to the public (contrary to s. 11 of the Road Traffic Act, 1930) and with driving without due care and attention (contrary to s. 12), pleaded not guilty to the former charge but guilty to the latter. The former charge was dismissed and the appellant was convicted on the latter. The facts relevant to the determination of the validity of the notices of intended prosecution appear in the judgment of DIPLOCK, J.

Cecil Binney for the appellant, the motorist.

E. A. Machin for the respondent, the prosecutor.

LORD PARKER, C.J.: I will ask DIPLOCK, J., to deliver the first judgment.

DIPLOCK, J.: This is an appeal on Case Stated by Mr. Paul Bennett, a metropolitan magistrate, and the facts and point which arise in it are quite short. On Feb. 11, 1958, the appellant took part in a traffic incident with his motor car

* The relevant part of s. 21 is printed at p. 357, letter I, to p. 358, letter B, post.

A at Eaton Gate in London. On Feb. 14 a notice of intended prosecution was served on the appellant, and it was in this form, headed:

B "Notice of intended prosecution. Sir, Pursuant to s. 21 (c) of the Road Traffic Act, 1930, I am directed by the Commissioner of Police of the Metropolis to give you notice that it is intended to institute proceedings against you for the following offences:—Driving a motor vehicle in a manner dangerous to the public, driving a motor vehicle without due care and attention, driving a motor vehicle without reasonable consideration for other persons using the road, contrary to s. 11 and s. 12 of the Road Traffic Act, 1930 [then there are the particulars of the occurrence] at about 10.50 p.m. on Feb. 11, 1958, at Eaton Gate, S.W.1, junction Eaton Terrace."

C That was signed by one J. Vaughan, acting police superintendent.

Some thirteen days later, on Feb. 27, another letter was sent to the appellant. That was in the following form: it bore the same reference number as the previous letter:

D "Sir, I am directed by the Commissioner of Police of the Metropolis to refer to the incident arising out of the use of motor vehicles [then there are their registration numbers] on Feb. 11, 1958, at Eaton Gate, S.W.1, junction Eaton Terrace, and to say that, after careful consideration, the police have decided not to take any further action in the matter."

That was signed by one Dix, acting chief inspector of police on behalf of the superintendent. On Mar. 13, a fortnight later, a third letter was sent to the appellant. It was addressed from New Scotland Yard, signed on behalf of the Assistant

E Commissioner, and was in the following terms:

F "Sir, I am directed by the commissioner to refer to the letter of Feb. 27, 1958, sent to you by the superintendent at Gerald Road Police Station, concerning an incident arising out of the use of your motor vehicle [then there are the particulars of the number and place] in which letter it was said that after careful consideration the police had decided not to take any further action in the matter. I am now to say that after further consideration the commissioner has decided to institute proceedings against you for driving in a manner dangerous to the public and for driving without due care and attention contrary to s. 11 and s. 12 of the Road Traffic Act, 1930."

The issue is set out in para. 3 of the Case as follows:

G "It was contended by the appellant that s. 21 of the Road Traffic Act, 1930, had not been complied with in that the notice of intended prosecution had been withdrawn by the letter of Feb. 27, 1958, and the only effective notice of intended prosecution received by him was the letter dated Mar. 13, 1958, and this was sent more than fourteen days after the commission of the offence alleged. It was contended by the respondent that the notice of
H intended prosecution was valid and could not be and was not in fact withdrawn."

The learned magistrate's opinion was that s. 21 of the Road Traffic Act, 1930, had been complied with by the original notice of intended prosecution of Feb. 14; the appellant pleaded guilty to driving without due care and the charge of dangerous driving was dismissed and the appellant was fined £5 and £5 costs.

I Counsel for the appellant has contended here that certain words must be implied in s. 21 of the Act of 1930. Section 21 of the Road Traffic Act, 1930, reads as follows:

"Where a person is prosecuted for an offence under any of the provisions of this Part of this Act relating respectively to the maximum speed at which motor vehicles may be driven, to reckless or dangerous driving, and to careless driving he shall not be convicted unless either—(a) he was warned at the time the offence was committed that the question of prosecuting him

for an offence under some one or other of the provisions aforesaid would be taken into consideration; or (b) within fourteen days of the commission of the offence a summons for the offence was served on him; or (c) within the said fourteen days a notice of the intended prosecution specifying the nature of the alleged offence and the time and place where it is alleged to have been committed was served on or sent by registered post to him or the person registered as the owner of the vehicle at the time of the commission of the offence."

Those three conditions are alternative, and the condition relied on in the present case is condition (c).

The purpose of the section is clear and has been expressed by this court on a number of occasions, namely, that a person concerned in a traffic accident should be informed at an early stage of the intended prosecution so that he can obtain his witnesses and prepare his case. Counsel for the appellant has argued that para. (c) of the section must be read as containing by implication some such words as "notice of intended prosecution was served or sent by registered post to him and has not been withdrawn", or else that the effect of the second letter which I have read is to nullify or cancel the effect of the first notice. A possible alternative way of putting it would be, no doubt, that as the result of the second letter the police were estopped from proceeding with the prosecution.

It seems to us that in the argument of counsel for the appellant there is implicit a fundamental fallacy, viz., that only the police can prosecute for an offence of this nature. That is not so. Although in all but an infinitesimal number of cases, no doubt, information is laid and the prosecution is conducted by a particular police officer, that is not by virtue of his being a police officer: he is exercising the right of any member of the public to lay an information and to prosecute an offence. It therefore follows that when one looks at the three alternative conditions precedent to conviction laid down by s. 21, the warning, the serving of the summons or the giving of the notice of intended prosecution, such warning may be given and such summons may be served or such notice may be given by any member of the public and not merely by a police officer; and that, when such a warning has been given, such a summons has been served or such notice of intended prosecution has been given, anyone who wishes to prosecute may take advantage of it. It would indeed be difficult to argue that, if a person had been warned at the time of the accident under para. (a), a letter written by the police afterwards saying that they did not intend to prosecute would nullify the effect of the warning and so prevent anyone else prosecuting for that offence. It seems to us that the same considerations apply to para. (c) and that it is impossible to read into that paragraph the words which counsel for the appellant seeks to imply. What the paragraph requires is that a notice should be given of intended prosecution, it matters not by whom, within the period laid down by the paragraph and, once that is given, the condition precedent and the only condition precedent to a conviction is fulfilled.

It must not be thought, because we have come to the conclusion that that is the construction of the Act, that the habit of sending a letter to say that proceedings will not be brought and then subsequently sending a letter that the police have changed their mind is a practice to be commended. It is one which may lead in certain circumstances to considerable injustice to the person prosecuted; but, though that may be so, it does not seem to us that we can be induced to read further words into the plain words of the Act. There is this also to be observed, that one of the ultimate sanctions of the rule of law in this country is the right of private persons to lay informations and bring prosecutions. If counsel for the appellant's argument were right, it would be possible for the police to use a dispensing power in relation to an intended prosecution by sending a notice under para. (c) by one post and withdrawing it by the next post. This appeal is accordingly dismissed.

- A** **STREATFEILD, J.:** I agree, but I confess that I do so with some reluctance. I base my opinion solely on the construction of s. 21 of the Road Traffic Act, 1930; it seems to me, reading the three alternative requirements together, that if a policeman was on the spot when an accident took place and in fact warned an offender that the question of his prosecution would be taken into consideration, no amount of subsequent intimation that a prosecution was not going to take place would obliterate the fact that he had been warned, which is the only requirement of para. (a). In the same way, if a summons were served within fourteen days and proceedings actually commenced under para. (b), no amount of intimation that the summons was not going to be proceeded with would, as it were, undo that summons. Similarly, under para. (c) where notice has been given of intended prosecution within fourteen days, no amount of cancellation of that notice would obliterate the fact that notice was given. On the true construction of this section all that is required is that either a warning shall be given at the time or proceedings shall be commenced within fourteen days or a notice of intended prosecution shall be given within fourteen days. So long as one or other of those conditions precedent is fulfilled, there is no bar to a conviction. Within the four walls, therefore, of that section I agree that the argument of counsel for the appellant in this court must fail.

D At the same time, when one bears in mind that the basis of the requirements of s. 21 is that a person who is accused or who may be accused of an offence under s. 11 or s. 12 of the Road Traffic Act, 1930, may be given fair warning or a fair chance to prepare his defence and to call his witnesses, one sees at once that the allegation or the statement in a printed form that the police have decided not to take any further action after all, having given notice they intend to, may cause an accused person to experience a sense of false security. He may allow his witnesses to disperse to the four corners of the world beyond recall. Then if the police afterwards change their minds and give him notice that they intend to prosecute after all, he may be left in the air so far as his witnesses are concerned. It may therefore be, if that is encouraged, that the purpose of s. 21 may fail.

E I do not think that there is any question of any injustice having resulted in this case because the appellant in fact pleaded guilty to careless driving and was dealt with on that basis. Of course, some people may even be induced to plead guilty because they have not their witnesses to satisfy the court. It may well be that in this case no injustice has been done, but one can quite conceive that in future there might be a case where a notice of intended prosecution is given and where it is then for all practical purposes withdrawn in plain English and then, if it is reinstated afterwards, it may well work an injustice. One can only say that one can rely, and I am sure with confidence, on the integrity of the police and still more on the integrity of the justices to see that no man in fact suffers injustice through it. One can well sympathise, however, with a man who, having been given a notice, has been served with a purported cancelling notice by precisely the same authority, and then out of the blue there comes another letter from the same authority, the Commissioner of Police, saying that after all he is going to prosecute; one can well understand such a person feeling a sense of grievance. Nevertheless, on a true construction of s. 21 what was done in this case was done within the four corners of s. 21. It is for those reasons, therefore, that I agree with the judgment of DIPLOCK, J.

I **LORD PARKER, C.J.:** With some regret I have come to the same conclusion and I have nothing to add.

Appeal dismissed.

Solicitors: *Amery-Parkes & Co.* (for the appellant); *Solicitor, Metropolitan Police.*

[*Reported by HENRY SUMMERFIELD, ESQ., Barrister-at-Law.*]

Re BARON KALMAN DE DEMKO.

[COURT OF APPEAL (Lord Evershed, M.R., Sellers and Pearce, L.J.J.), October 6, 7, 1958.]

Court of Appeal—Jurisdiction—Original or appellate jurisdiction—Appeal from order of Divisional Court refusing application to discharge fugitive—Whether court had dual jurisdiction both original and appellate—Fugitive Offenders Act, 1881 (44 & 45 Vict. c. 69), s. 10, s. 39.

Extradition—Discharge of fugitive—Application refused by Divisional Court—Whether Court of Appeal had jurisdiction to entertain appeal from decision of Divisional Court—Fugitive Offenders Act, 1881 (44 & 45 Vict. c. 69), s. 10, s. 39.

Since the Court of Appeal has original jurisdiction under s. 10 of the Fugitive Offenders Act, 1881, that court being itself a superior court within the definition of that term in s. 39, the Court of Appeal has not also appellate jurisdiction under those enactments.

R. v. Brixton Prison (Governor), Ex p. Savarkar ([1910] 2 K.B. 1056) considered and applied.

On the refusal of a Divisional Court of the Queen's Bench Division to grant relief to an applicant under s. 10* of the Fugitive Offenders Act, 1881, the applicant appealed to the Court of Appeal. By s. 10 the power to grant relief was given to a "superior court" and by s. 39, the definition section of the Act, "superior court" meant, in England, "Her Majesty's Court of Appeal and High Court".

Held: the Court of Appeal had no jurisdiction to entertain the appeal. Appeal dismissed.

[As to the discharge of a fugitive by order of a superior court, see 16 HALSBURY'S LAWS (3rd Edn.) 590, para. 1225.

For the Fugitive Offenders Act, 1881, s. 10, s. 39, see 9 HALSBURY'S STATUTES (2nd Edn.) 901, 912.]

Cases referred to:

- (1) *Ex p. Woodhall*, (1888), 20 Q.B.D. 832; 57 L.J.M.C. 71; 59 L.T. 841; 52 J.P. 581; 16 Digest 270, 795.
- (2) *Amand v. Secretary of State for Home Affairs*, [1942] 2 All E.R. 381; sub nom. *Amand v. Home Secretary & Minister of Defence of Royal Netherlands Government*, [1943] A.C. 147; sub nom. *R. v. Secretary of State for Home Affairs & Minister of Defence of the Royal Netherlands Government, Ex p. Amand*, 111 L.J.K.B. 657; 167 L.T. 177; 2nd Digest Supp. 82 L.J.K.B. 1197; 109 L.T. 562; 16 Digest 132, 303.
- (3) *National Telephone Co., Ltd. v. Postmaster-General*, [1913] A.C. 546; 82 L.J.K.B. 1197; 109 L.T. 562; 16 Digest 132, 303.
- (4) *R. v. Brixton Prison (Governor), Ex p. Savarkar*, [1910] 2 K.B. 1056; 80 L.J.K.B. 57; 103 L.T. 473; 24 Digest (Repl.) 1014, 174.
- (5) *Re Henderson, Henderson v. Secretary of State for Home Affairs*, [1950] 1 All E.R. 283; 24 Digest (Repl.) 1014, 175.

Appeal.

The applicant appealed from an order made by the Queen's Bench Divisional Court (DEVLIN, DONOVAN and ASHWORTH, JJ.) on July 14, 1958, refusing to grant him relief under s. 10 of the Fugitive Offenders Act, 1881, and dismissing his application for a writ of habeas corpus. The Crown took the preliminary objection that the Court of Appeal had no jurisdiction to entertain the appeal.

F. H. Lawton, Q.C., and *P. A. W. Merriton* for the applicant.

The Solicitor-General (Sir Harry Hyllton-Foster, Q.C.), *Rodger Winn* and *B. T. Wigoder* for the Secretary of State for Home Affairs and the Governor of Brixton Prison.

J. C. Phipps for the High Commissioner for the Union of South Africa.

* The terms of s. 10 are printed at p. 361, letter H, post.

A **LORD EVERSHED, M.R.:** This is an appeal from an order made by the Divisional Court of the Queen's Bench Division on July 14, 1958. The order reads:

B "Upon the application of Baron Kalman de Demko for leave to issue a writ of habeas corpus ad subjiciendum and for relief pursuant to the Fugitive Offenders Act, 1881, s. 10. And upon hearing [counsel] . . . And upon reading [evidence] . . . no order is made pursuant to the said Act and the application that a writ of habeas corpus ad subjiciendum do issue is hereby refused . . ."

C My reading of the order sufficiently indicates the nature of the application. The greater part of the judgment of DEVLIN, J. (which was the leading judgment in the Queen's Bench Division) dealt with and was related to the application under the Fugitive Offenders Act, 1881. It appears that the applicant had been charged with certain offences, and the learned judge said that one of them could not in any circumstances be suggested as trivial. He, therefore, concluded that it would not be unjust or oppressive that the applicant should be required to return to South Africa in order to stand his trial, and he did not think that the lapse of time since the alleged offences substantially altered the result.

D The notice of appeal is dated July 29, 1958, and we agreed yesterday that we should expedite the appeal since it was a matter involving the liberty of the individual. Counsel for the applicant has not pressed that part of his original application which asked for leave to issue a writ of habeas corpus. He accepts that it must be taken now as clearly decided, by authorities binding on this court* (see, for example, *Ex p. Woodhall* (1) ((1888), 20 Q.B.D. 832) and *Amand v. Secretary of State for Home Affairs* (2) ([1942] 2 All E.R. 381)), that the widest construction will be given to the formula "criminal cause or matter" in s. 31 (1) (a) of the Supreme Court of Judicature (Consolidation) Act, 1925, with the result that s. 31 (1) of the Act of 1925 makes it plain that we have in this court no jurisdiction to entertain an appeal from a decision of the Divisional Court refusing leave to issue a writ of habeas corpus. But counsel for the applicant pressed his application under s. 10 of the Fugitive Offenders Act, 1881, which (as he rightly observed) has not been the subject of any direct authority binding on this court. The Solicitor-General, for the Governor of Brixton Prison, has taken the preliminary objection that s. 31 (1) of the Act of 1925 applies to an appeal, or a purported appeal, under the Fugitive Offenders Act, 1881, so that we in this court have no more jurisdiction to entertain such an appeal than we have to entertain an appeal in relation to the habeas corpus application.

G In my judgment, the preliminary objection is well-founded. I turn first to the Fugitive Offenders Act, 1881, itself. It is not in doubt that the alleged offences with which the applicant has been charged are within the scope of the Act and form the subject of the phrase a "criminal cause or matter". Section 10 of the Act provides:

H "Where it is made to appear to a superior court that by reason of the trivial nature of the case, or by reason of the application for the return of a fugitive not being made in good faith in the interests of justice or otherwise, it would, having regard to the distance, to the facilities for communication, and to all the circumstances of the case, be unjust or oppressive or too severe a punishment to return the fugitive either at all or until the expiration of a certain period, such court may discharge the fugitive, either absolutely or on bail, or order that he shall not be returned until after the expiration of the period named in the order, or may make such other order in the premises as to the court seems just."

I The phrase "superior court" is defined in s. 39 of the same Act, which provides:

"The expression 'superior court' means: (1) In England, Her Majesty's

* They are cited in 11 HALSBURY'S LAWS (3rd Edn.) 49.

Court of Appeal and High Court; and (2) In Scotland, the High Court of Justiciary . . .” A

The argument of counsel for the applicant is, briefly, as follows. Since by the express language of the definition section the Court of Appeal is included in the phrase “superior court” and, therefore, given jurisdiction, that jurisdiction must be, or at least include, the function which that court normally performs—namely, the function of hearing appeals. In support of that general proposition, counsel referred (for example) to the language of LORD PARKER OF WADDINGTON in *National Telephone Co., Ltd. v. Postmaster-General* (3) ([1913] A.C. 546 at p. 562), where LORD PARKER said: B

“Where by statute matters are referred to the determination of a court of record with no further provision, the necessary implication is, I think, that the court will determine the matters, as a court. Its jurisdiction is enlarged, but all the incidents of such jurisdiction, including the right of appeal from its decision, remain the same.” C

As I have referred to that passage, I should add, in regard to it, that the real question before the House in *National Telephone Co., Ltd. v. Postmaster-General* (3) was whether the Railway and Canal Commission, which had been given jurisdiction as regards certain matters arising under the Telegraph (Arbitration) Act, 1909, was to act in regard to those matters as an arbitrator or as a court. The House decided in favour of the latter view, with the consequence that, in the ordinary course, an appeal lay from the decision of the commission. To revert to counsel’s argument, he added the further, by no means insignificant, point that the original jurisdiction of the creature of statute, namely, the Court of Appeal, is of an extremely limited character: see, for example, the notes to R.S.C., Ord. 58, r. 1, in the ANNUAL PRACTICE, 1958, p. 1651. D

If the sections of the Fugitive Offenders Act, 1881, which I have read stood alone, and the matter were entirely *res integra*, I think, for my part, that there would be great force in the submissions of counsel for the applicant. But, if he were right in saying that the reference to the Court of Appeal meant, by necessary inference, that it was to exercise, in regard to these matters, its ordinary appellate jurisdiction, then one would not suppose that the Court of Appeal had original jurisdiction in this kind of matter also. As I have said, there is no direct authority binding on this court to the effect that this court has no appellate jurisdiction in these matters; but there is direct authority for the view that this court has an original jurisdiction in these matters. That authority is *R. v. Brixton Prison (Governor), Ex p. Savarkar* (4) ([1910] 2 K.B. 1056). The original jurisdiction was also assumed in *Re Henderson, Henderson v. Secretary of State for Home Affairs* (5) ([1950] 1 All E.R. 283). E

In *R. v. Brixton Prison (Governor), Ex p. Savarkar* (4), an application had been made to the Divisional Court (as in the present case) both for leave to issue a writ of habeas corpus and also under s. 10 of the Fugitive Offenders Act, 1881, the prisoner in question having been committed to prison under the Act of 1881. The Divisional Court had rejected the application, but (as appears clearly from the report) the order in fact drawn up was limited to a refusal to give leave to issue the writ of habeas corpus: it was wholly silent as to the application under s. 10 of the Fugitive Offenders Act, 1881. The prisoner having appealed, the then Solicitor-General, Sir Rufus Isaacs, took the preliminary objection (in much the same way as the present Solicitor-General has done in this case) that this court had no jurisdiction to entertain the appeal or the application at all. His argument ended as follows ([1910] 2 K.B. at p. 1061): F

“The present case, it is true, arises under the Fugitive Offenders Act, 1881, under which the appellant has been committed to prison in this country to take his trial in another part of His Majesty’s dominions, but no trace is to be found in that Act of an appellate jurisdiction being given to G

- A this court, and the principle of the decision in *Ex p. Woodhall* (1) is decisive of the present case."

His argument was countered by Mr. Powell, for the prisoner, and, as reported, Mr. Powell's argument closely reflects the argument of counsel for the applicant in the present case. The argument is thus reported (*ibid.*, at p. 1062):

- B "By s. 10 and s. 35 certain powers are given to a 'superior court', which expression is by s. 39 defined to mean 'In England, Her Majesty's Court of Appeal and High Court of Justice'. It must be inferred from this that it was the intention of the legislature to confer upon the Court of Appeal an appellate jurisdiction in the case of applications made under the Act, as the present application was made; there was no other reason for including it in the definition of a superior court."

C Mr. Powell then concluded with this submission:

"It is further submitted that under the Act of 1881 the Court of Appeal has both an original and an appellate jurisdiction, and, if necessary, the court is asked to hear the application under the Fugitive Offenders Act, 1881, in the exercise of its original jurisdiction."

- D This court, having observed the form of order appealed from, came to the conclusion that the order did not deal at all with the application under the Fugitive Offenders Act, 1881, and, treating it as confined to the application for a writ of habeas corpus, they then proceeded to dismiss the appeal. The learned counsel for the prisoner thereupon made an original application to the Court of Appeal, under the Fugitive Offenders Act, 1881, and Sir Rufus Isaacs sought (persisting in his preliminary objection) to defeat that by saying that, on a true construction of the statutes, an application for a writ of habeas corpus involved the application under the Fugitive Offenders Act, 1881, so that the latter must be treated as having, *sub silentio*, been dealt with by the dismissal of the habeas corpus application. Mr. Powell, on that matter, was not called on.
- E The leading judgment was delivered by VAUGHAN WILLIAMS, L.J., who said ([1910] 2 K.B. at p. 1069):

"I start with the assumption that, under the Fugitive Offenders Act, 1881, there is concurrent jurisdiction to deal with such an application in each court which comes within the definition of a 'superior court' given by the Act, and therefore we have power to deal with such an application as a court of first instance."

G

After referring to the definition of "superior court" which gave power to the Court of Appeal to entertain originally the application, VAUGHAN WILLIAMS, L.J., continued (*ibid.*, at pp. 1069, 1070):

- H "This being so, in the absence of anything to qualify the effect of this provision in the rest of the Act, it necessarily gives to each of the courts which come within the category of a 'superior court', as defined by the interpretation clause, jurisdiction to deal with such matters on the same basis, not on the basis that one is a court of first instance and the other is a court of appeal. It appears to me that it cannot be that the Court of Appeal, having regard to the provisions of s. 47 of the Judicature Act, 1873,
- I was intended to exercise appellate jurisdiction in respect of matters arising under an Act dealing entirely with procedure in a certain class of criminal prosecutions."

Later, he said (*ibid.*, at p. 1072):

"The ultimate conclusion at which I arrive is that the applicant is entitled to make this application to us, first, because an application such as this may be made to any court which comes within the definition of a 'superior court' given by the Fugitive Offenders Act, 1881; and secondly

because, assuming that no such application could be entertained after the matter had once been adjudicated upon by a superior court, in my opinion, we must look for such an adjudication in the record of the court . . .” A

He then pointed out that the record was silent on the matter. FLETCHER MOULTON, L.J., said ([1910] 2 K.B. at p. 1073):

“ In the first place I am satisfied that under s. 10 and s. 35 of the Fugitive Offenders Act, 1881, jurisdiction is given to this court to hear an application of this kind, and that this jurisdiction is a jurisdiction concurrent with that of the High Court, both this court and the High Court being included in the designation ‘superior court’ by virtue of the definition of that expression in s. 39 of the Act.” B

FLETCHER MOULTON, L.J., concluded his judgment (*ibid.*, at p. 1076): C

“ Therefore it must be taken that the questions raised by the present application have not been heard and decided in proceedings properly raising them before a court of concurrent jurisdiction; and consequently, without deciding whether, if they had been so heard and adjudicated upon, it would have prevented us from hearing this application, it is open to us to treat the matter as *res nova*, and not *res judicata*.” D

BUCKLEY, L.J., had taken a somewhat different view of the construction of the Act—a view more in conformity, it is fair to say, with the submission of counsel for the applicant in the present case. He concluded his judgment as follows ([1910] 2 K.B. at p. 1079):

“ There is one other point upon which I wish to say a word. It is this: it would be another possible objection to the original motion which, as the result of this judgment, we are going to hear that, where the Act of 1881 refers to the ‘Court of Appeal’ as a ‘superior court’, it means that court sitting as a court of appeal. The learned Solicitor-General has not thought fit to argue that point. I agree with what VAUGHAN WILLIAMS, L.J., has said to the effect that we must for ourselves determine that point in order to hear this motion. As my two brothers think that that point is to be resolved in favour of our hearing the motion, of course that decides the matter. For my own part, I have not heard the matter argued, and will only say that I think it is a question of very considerable difficulty whether, when this Act speaks of the ‘Court of Appeal’, it does not mean the Court of Appeal sitting as a court of appeal. It is unnecessary for me to say more as to this point, because the other members of the court do not think that is the meaning. Under these circumstances I do not think that the preliminary objection can be upheld.” E

What, then, so far as is relevant to this appeal, is the result of that case? I observe that it was decided in 1910 and has not since been the subject of any adverse comment. I think, first, that it provides clear authority (and I have already referred to *Re Henderson* (5)) for the view that, on the true construction of the Fugitive Offenders Act, 1881, the Court of Appeal has original jurisdiction to hear an application under s. 10. I think it also clear that all three judges thought (to say the least) that it was extremely improbable that, by virtue of the definition section and its operation on s. 10, this court could have both original and appellate jurisdiction. VAUGHAN WILLIAMS, L.J., expressly said that in his view it could not have both; and although FLETCHER MOULTON, L.J., reserved the matter, it is, I think, clear enough from the view expressed by BUCKLEY, L.J., that he thought that a choice would have to be made between the one and the other, although, if he had been left to himself, his own choice would have been by way of a preference contrary to that entertained by his colleagues. Third, I think that the case does contain, though no decision, at least indications which are contrary to the argument of counsel for the applicant, H I

A and I have, for this purpose, been careful to read the arguments of Sir Rufus Isaacs and Mr. Powell at the beginning of the hearing. I should, therefore, be disposed to think that the proper inferences to be drawn from *R. v. Brixton Prison (Governor), Ex p. Savarkar* (4) are such as should guide us to decide this case in the way which the Solicitor-General contended. In any event, given that there is to be taken as conferred by s. 10 of the Fugitive Offenders Act, 1881, an original jurisdiction on this court (as we must assume), then I conclude clearly that we cannot have also appellate jurisdiction.

I base that conclusion, briefly, on these steps. First, it is a necessary premise to the argument of counsel for the applicant that, there being no express grant of appellate jurisdiction, we must find it in the inferences to be derived from the definition. In other words, to use counsel's language, if one finds jurisdiction given to what is a court of appeal, then there is pregnant in that conferred jurisdiction the notion of appellate functions. Against that submission it must be borne in mind that the Act of 1881 succeeded by eight years the passage of the Supreme Court of Judicature Act, 1873. That was the Act which consolidated into a single Supreme Court the various courts which had up to then been distinct—the Court of Chancery, the Court of Exchequer, the Court of Queen's Bench, and so forth—and created, as part of the Supreme Court, this court, the Court of Appeal. The jurisdiction and functions of the Court of Appeal are dealt with in the appropriate sections of the Act of 1873, and I can confine myself to a reference to one, namely, s. 47, which provides:

E “The jurisdiction and authorities in relation to questions of law arising in criminal trials which are now vested in the justices of either Bench and the barons of the Exchequer by [the Crown Cases Act, 1848] shall and may be exercised after the commencement of this Act by the judges of the High Court of Justice, or five of them at the least [including certain named ones]. The determination of any such question by the judges of the said High Court in manner aforesaid shall be final and without appeal; and no appeal shall lie from any judgment of the said High Court in any criminal cause or matter, save for some error of law apparent upon the record, as to which no question shall have been reserved for the consideration of the said judges under [the Crown Cases Act, 1848].”

If that section is borne in mind, it seems to me no longer true to say, necessarily, that a reference to the Court of Appeal in such a context as is found in the Fugitive Offenders Act, 1881, connotes or carries with it the notion of the exercise of appellate function. The Court of Appeal was a creature of statute then only a few years old; and in the statute which created the Court of Appeal it had been clearly laid down that in regard to criminal causes or matters no appeal should lie to it: it should have no appellate jurisdiction or function.

H The matter, however, does not entirely rest there. I think, for my part, that indications supporting that view are to be found in the Fugitive Offenders Act, 1881, itself. They may be slight, but they point, I think, in the same direction. One is to be derived from s. 6 of the Act of 1881. That section reads:

I “Upon the expiration of fifteen days after a fugitive has been committed to prison to await his return, or if a writ of habeas corpus or other like process is issued with reference to such fugitive by a superior court, after the final decision of the court in the case . . .”

I agree with the Solicitor-General that that is a form of words which does not, on the face of it, seem to fit at all readily with the notion that there might be an appeal from one part of the “superior court” to another. And if one looks at the definition itself*, it is “. . . ‘superior court’ means: (1) in England, Her Majesty's Court of Appeal and High Court . . .” I should have thought

* See pp. 361, 362, ante.

that, if it had been intended by this somewhat oblique method to confer on, or to indicate an appellate jurisdiction in, the Court of Appeal, it would have been much more natural to have reversed the order and said "the High Court and the Court of Appeal". For what it is worth, it is to be noted that no definite article appears before "High Court". I, therefore, read the relevant definition of "superior court" as merely synonymous with "the Supreme Court of Judicature" established by the Act of 1873 and without having any reference in it, implicit or otherwise, to an appellate jurisdiction conferred on part of that court. Counsel for the applicant referred to the fact that there is no similar distinction, in the reference to the High Court of Justiciary in Scotland, between the Outer House and the Inner House. I do not, however, think that that matter carries any weight in the context. Those are the reasons, therefore, which have persuaded me that, apart from any implications of *R. v. Brixton Prison (Governor)*, *Ex p. Savarkar* (4), the right answer is that, given original jurisdiction in this court, we have not got at the same time appellate jurisdiction.

There remains, finally, the Supreme Court of Judicature (Consolidation) Act, 1925. Counsel for the applicant referred first to the language of s. 26, which appears under the heading "Jurisdiction of the Court of Appeal". Section 26 provides:

"(1) The Court of Appeal shall be a superior court of record.

(2) There shall be vested in the Court of Appeal . . . (d) All jurisdiction which, under or by virtue of any enactment which came into force after the commencement of the Act of 1873 and is not repealed by this Act, was immediately before the commencement of this Act vested in or capable of being exercised by the Court of Appeal constituted by the Act of 1873."

In those words, counsel for the applicant finds secreted (if I may use the word without offence to his argument) a reference to the jurisdiction (he says the appellate jurisdiction) conferred by s. 10 of the Fugitive Offenders Act, 1881, which, therefore, is expressly preserved. Section 31 (1) of the Act of 1925 reads:

"No appeal shall lie—(a) except as provided by the Criminal Appeal Act, 1907, or this Act, from any judgment of the High Court in any criminal cause or matter . . ."

Counsel says that the three words "or this Act" refer back to s. 26 (2) (d), so as to preserve the appellate jurisdiction of this court in cases under the Fugitive Offenders Act, 1881. The argument is, if I may say so, ingenious, but I find it not persuasive. One has to begin by the consideration that the Act of 1925 is expressed to be a consolidating Act, and one does not look for substantial changes in the law, or the jurisdiction, in a consolidating Act—and one certainly would not be astute to find them in language so extremely obscure as that which I have read, if it is to be applied for this purpose. Indeed, in remembering that this is a consolidation Act one has also to remember that Parliament must be taken to have been aware of the decisions of the courts in the meantime, and particularly of the decision in *R. v. Brixton Prison (Governor)*, *Ex p. Savarkar* (4) in 1910.

I have already indicated that, if this argument were to prevail, it would appear that the draftsman had preserved the right in language more obscure and oblique than one would think possible. In truth, the plain language of the section seems to me to be in entire conformity with the argument of the Solicitor-General. The words "or this Act" in s. 31 (1) (a) of the Act of 1925 have a context and an application in another section, s. 29, of the Act and thus are not left, so to speak, entirely in the air. Indeed, reading them as I do according to their ordinary sense, I think that the Act of 1925 rather confirms and supports the implications which I have drawn from the earlier legislation than otherwise. For these reasons, I think that the preliminary objection here must prevail,

A and that we must hold in this matter that we have no jurisdiction to entertain an appeal. I would, therefore, dismiss the appeal on that ground.

SELLERS, L.J.: I too would uphold the submission of the learned Solicitor-General that this court has no jurisdiction to entertain this appeal. I agree so fully with the reasons given by my Lord that I do not propose to reiterate them in less impelling words of my own. Although many attempts have been made to persuade this court that it should hear appeals from decisions in habeas corpus proceedings, they have been consistently refused where the matter has been one of a criminal nature or relating to a criminal cause or matter. This is the first time that an attempt has been made to persuade this court that it has a power and duty to hear an appeal under s. 10 of the Fugitive Offenders Act, 1881—and the period of time from 1881 to the present is a considerable one: the first time notwithstanding that in 1910 BUCKLEY, L.J., raised the question and expressed his view on the matter as my Lord indicated in his judgment*. Forty years after 1910 this court did in fact, in *Re Henderson, Henderson v. Secretary of State for Home Affairs* (5), hear a case on an original application to it under s. 10. The Fugitive Offenders Act, 1881, and, in particular, s. 39 thereof, makes it clear that this court has some jurisdiction. It has been held in 1910, and acted on since, that that jurisdiction is an original jurisdiction. Unless it can be said that there can be a dual jurisdiction, both original and appellate, then that decision as far back as 1910, and existing unchallenged up to the present time, would establish that the jurisdiction has already been decided to be original and would be binding on this court. On the reasoning which my Lord has advanced and on the argument on which the learned Solicitor-General relied, it does not seem possible, in my view, to say that the jurisdiction given to this court was a dual one. For my part (and this is why I have ventured to make one or two observations in addition to those of my Lord), if the matter were to come afresh, I think that my view would be that I should agree with the views taken by VAUGHAN WILLIAMS and FLETCHER MOULTON, L.JJ., that the proper interpretation of the words which have been relied on gives an original jurisdiction, and not an appellate jurisdiction, to this court. It may seem, in the light of what had taken place only a few years before—that criminal matters were excluded from the purview of this court—a little strange, perhaps, that such original jurisdiction should be given, but I think that it would be even more strange if the statute were to give, in such words as exist for our consideration, an appellate jurisdiction, even though limited, in those matters which have been so clearly excluded. I only add these few observations in support of the judgment which my Lord has given.

PEARCE, L.J.: I agree with all that my Lords have said.

Appeal dismissed. Leave to appeal to the House of Lords granted.

Solicitors: *Beach & Beach* (for the applicant); *Director of Public Prosecutions* (for the Home Secretary and the Governor of Brixton Prison); *Jaques & Co.* (for the High Commissioner for South Africa).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

* See p. 364, letters E to G, ante.

PERKOWSKI v. CITY OF WELLINGTON CORPORATION.

[PRIVY COUNCIL (Viscount Simonds, Lord Morton of Henryton, Lord Keith of Avonholm, Lord Somervell of Harrow and Lord Denning), July 10, 14, 15, 16, 17, October 14, 1958.]

Privy Council—New Zealand—Licensee—Negligence—Licensor's duty of care—Death from injuries suffered when diving from a spring board on premises occupied by local authority—Liability of local authority.

Privy Council—Appeal—Trial before judge and jury—Fresh point raised which was not raised or considered by judge and jury.

In January, 1954, P. died as a result of injuries which he had suffered when he dived into shallow water from a spring board at low tide at Worser Bay in the City of Wellington. The appellant, his widow, claimed damages under the New Zealand Deaths by Accident Compensation Act, 1952, from the respondents. At the trial the appellant put her case on the basis that her husband was a licensee, and the jury found that the respondents, who had erected the spring board some years previously, were the occupiers of the premises comprising the spring board, that the spring board did not constitute a concealed danger at low tide, and that both the deceased and the respondents were negligent in a manner contributing to the fatality. After verdict on the findings of the jury, judgment was entered for the respondents. Before the New Zealand Court of Appeal and before the Judicial Committee, the appellant sought to base her claim on a submission that her husband was an invitee, not a licensee, or was a person to whom the respondents as a local authority owed a general duty of care. The Court of Appeal decided that the appellant could not raise this contention before them as the point had not been taken at the trial.

Held: (i) as the spring board was not a concealed danger, the appellant failed to establish a breach of duty by the respondents flowing from the relationship of licensor to licensee; moreover (a) the fact that the respondents had erected the spring board some years previously did not impose on them some other general duty of care towards the deceased, and (b) the law as between licensor and licensee was not displaced either by there having been no defect in the spring board or by the fact that the danger arose from the use of the shallow sea outside the area of land occupied by the respondents.

Latham v. R. Johnson & Nephew, Ltd. ([1913] 1 K.B. 398) applied.

(ii) the Board would not interfere with the discretion exercised by the New Zealand Court of Appeal not to allow the appellant to put her case on appeal on the footing that the deceased was an invitee since that had not been raised at the trial, particularly as on that footing further questions might have been left to the jury, their answers to which were unpredictable.

Dictum of LORD WATSON in *Connecticut Fire Insurance Co. v. Kavanagh* ([1892] A.C. at p. 480) applied.

Appeal dismissed.

[**Editorial Note.** In applying this decision in English law regard must be had to the Occupiers' Liability Act, 1957, s. 1 and s. 2 (37 HALSBURY'S STATUTES (2nd Edn.) 833, 834).

As to the duty of care owed to a licensee, see 23 HALSBURY'S LAWS (2nd Edn.) 610, para. 860; and for cases on the subject, see 36 DIGEST (Repl.) 65-68, 352-371. As to raising points in the Judicial Committee not raised and considered in the court below, see 9 HALSBURY'S LAWS (3rd Edn.) 392, para. 920; and for cases on the subject, see 16 DIGEST 153-156, 536-570.]

Cases referred to:

(1) *Latham v. Johnson (R.) & Nephew, Ltd.*, [1913] 1 K.B. 398; 82 L.J.K.B. 258; 108 L.T. 4; 77 J.P. 137; 36 Digest (Repl.) 49, 262.

- A (2) *Hounsell v. Smyth*, (1860), 7 C.B.N.S. 731; 29 L.J.C.P. 203; 1 L.T. 440; 141 E.R. 1003; 36 Digest (Repl.) 65, 356.
- (3) *Binks v. South Yorkshire Ry. & River Dun Co.*, (1862), 3 B. & S. 244; 32 L.J.Q.B. 26; 122 E.R. 92; sub nom. *Bincks v. South Yorkshire Ry. & River Dun Co.*, 7 L.T. 350; 27 J.P. 180; 38 Digest 414, 1032.
- (4) *Slater v. Clay Cross Co., Ltd.*, [1956] 2 All E.R. 625; [1956] 2 Q.B. 264; 3rd Digest Supp.
- B (5) *Mourton v. Poulter*, [1930] 2 K.B. 183; 99 L.J.K.B. 289; 143 L.T. 20; sub nom. *Moulton v. Poulter*, 94 J.P. 190; 36 Digest (Repl.) 71, 380.
- (6) *United Zinc and Chemical Co. v. Britt*, [1922] 258 U.S. 268.
- (7) *Brock v. Copeland*, (1794), 1 Esp. 203; 2 Digest (Repl.) 379, 547.
- (8) *Corby v. Hill*, (1858), 4 C.B.N.S. 556; 27 L.J.C.P. 318; 31 L.T.O.S. 181; 22 J.P. 386; 140 E.R. 1209; 36 Digest (Repl.) 67, 370.
- C (9) *Excelsior Wire Rope Co., Ltd. v. Callan*, [1930] A.C. 404; 99 L.J.K.B. 380; 142 L.T. 531; 94 J.P. 174; 36 Digest (Repl.) 118, 592.
- (10) *Plank v. Stirling Magistrates*, 1956 S.C. 92; 3rd Digest Supp.
- (11) *Purkis v. Walthamstow Borough Council*, [1934] All E.R. Rep. 64; 151 L.T. 30; 98 J.P. 244; 36 Digest (Repl.) 115, 570.
- D (12) *Ellis v. Fulham Borough Council*, [1937] 3 All E.R. 454; [1938] 1 K.B. 212; 107 L.J.K.B. 84; 157 L.T. 380; 101 J.P. 469; 36 Digest (Repl.) 121, 618.
- (13) *Baker v. Bethnal Green Corpn.*, [1945] 1 All E.R. 135; 109 J.P. 72; 36 Digest (Repl.) 217, 1148.
- (14) *Pearson v. Lambeth Borough Council*, [1950] 1 All E.R. 682; [1950] 2 K.B. 353; 114 J.P. 214; 36 Digest (Repl.) 69, 373.
- E (15) *Aiken v. Kingborough Municipality*, (1939), 62 C.L.R. 179; 45 A.L.R. 393; 13 A.L.J. 135; 2nd Digest Supp.
- (16) *Burrum Corpn. v. Richardson*, (1939), 62 C.L.R. 214.
- (17) *Connecticut Fire Insurance Co. v. Kavanagh*, [1892] A.C. 473; 61 L.J.P.C. 50; 67 L.T. 508; 57 J.P. 21; 16 Digest 155, 551.
- F (18) *Tasmania (Ship Owners & Freight Owners) v. Smith etc., City of Corinth (Owners), The Tasmania*, (1890), 15 App. Cas. 223; 63 L.T. 1; 41 Digest 708, 5446.
- (19) *North Staffordshire Ry. Co. v. Edge*, [1920] A.C. 254; 89 L.J.K.B. 78; 122 L.T. 385; 84 J.P. 33; 36 Digest (Repl.) 370, 98.

Appeal.

- G Appeal in forma pauperis by special leave by Ewa Perkowski, widow of Antoni Witold Perkowski, from a judgment of the Court of Appeal of New Zealand (BARROWCLOUGH, C.J., STANTON and F. B. ADAMS, JJ.), dated Oct. 12, 1956, dismissing an appeal by the appellant from a judgment of the Supreme Court of New Zealand (HUTCHINSON, J., sitting with a jury), dated Nov. 17, 1956.
- H The appellant's husband died on Jan. 10, 1954, in consequence of injuries suffered on Jan. 9, 1954, when he dived from a spring board, erected by the respondents at Worser Bay in the City of Wellington, into the sea beyond it at low tide when the water was shallow. In an action brought by the appellant against the respondents, the City of Wellington Corporation, under the New Zealand Deaths by Accident Compensation Act, 1952, in respect of her husband's death, the issues put to the jury and their answers were as follows:

I "1. (a) Was the defendant corporation occupier of the premises comprising the spring board? Answer: Yes. (b) If yes, did the spring board constitute a concealed danger at low tide? Answer: No. (c) If yes, ought the defendant to have maintained a warning notice board or tide gauge? Answer: —.

"2. Was the defendant negligent in a manner causing or contributing to the fatality in not maintaining a warning notice board or tide gauge? Answer: Yes.

"3. Was the deceased negligent in a manner causing or contributing to the fatality? Answer: Yes. A

"4. Damages (total) Special £41 5s. General £5,250. Total: £5,291 5s.

"5. If both the defendant and the deceased were at fault in a manner contributing to the fatality, by what percentage is it just and equitable that the total damages be reduced having regard to the share of the deceased in the responsibility for the fatality? Answer: eighty per cent." B

Both the appellant and the respondents moved for judgment. It was adjudged that the appellant's motion for judgment should be dismissed, and that judgment should be entered for the respondents.

B. J. M. Mackenna, Q.C., J. G. Le Quesne and R. B. Cooke (of the New Zealand Bar) for the appellant. C

H. A. P. Fisher for the respondents.

LORD SOMERVELL OF HARROW: This is an appeal from a judgment of the Court of Appeal of New Zealand dismissing an appeal from a judgment of the Supreme Court. The action was tried by HUTCHINSON, J., with a jury. There was argument after verdict on the findings of the jury, each side moving for judgment. HUTCHINSON, J., entered judgment for the defendants, the present respondents. The plaintiff appellant was granted special leave to appeal in forma pauperis by an Order in Council dated July 31, 1957. D

The appellant's husband died on Jan. 10, 1954, as a result of injuries suffered on the day before when he dived from a spring board at Worsley Bay in the City of Wellington. The claim was brought under the Deaths by Accident Compensation Act, 1952. The jury were asked first whether the respondent corporation was the occupier of the premises comprising the spring board. The respondents were admittedly occupiers of the land above high-water mark and certain off-shore rocks, but submitted that they were not occupiers of the spring board. The board was on a platform at the end of a wooden duck walk, the platform being on a concrete support set in the harbour bed. The respondents relied on this, and also on the fact that they had put up the board at the request of a swimming club. The jury found that the respondents were the occupiers of the premises comprising the spring board and neither side challenge that finding. The deceased had bathed in Worsley Bay and dived from the board on a number of previous occasions. The appellant put her case on the basis that the deceased was a licensee. The learned judge accepted this and so directed the jury. No exception was taken by counsel to that. It was conceded that, if the board constituted a concealed danger, the respondents had knowledge of it. The jury were asked as question 1 (b) whether the spring board constituted a concealed danger at low tide? They answered, no. There was ample evidence on which they could so find. Some of the appellant's own witnesses said that the water was clear and its shallowness at low tide apparent. E F G H

At the trial the appellant submitted that the respondents, if not occupiers, would have been under a duty as erectors of the board to take reasonable care for those who might use the board, and that that duty was broken by a failure to put up a warning notice or a tide gauge. The learned judge was doubtful at the time when he summed up whether there would, if the respondents were not occupiers, be such a duty. He formulated, however, the following three questions which, on his summing-up, did not arise if the jury answered the first question as to occupancy as they did. I

"2. [Were the respondents] negligent in a manner causing or contributing to the fatality in not maintaining a warning notice board or tide gauge? Answer: Yes.

"3. Was the deceased negligent in a manner causing or contributing to the fatality? Answer: Yes.

- A "5. If both the [respondents] and the deceased were at fault in a manner contributing to the fatality, by what percentage is it just and equitable that the total damages be reduced having regard to the share of the deceased in the responsibility for the fatality? Answer: eighty per cent."

B If the only liability on the respondents was to warn against concealed dangers these findings do not avail the appellant, and counsel for the appellant agreed that the appeal must fail. It was, however, submitted that, for differing reasons, the respondents were under a general duty to the appellant, and that the finding could be relied on as establishing a breach of that duty.

C It was submitted for the respondents that the answer to question 2 was one which should be disregarded as perverse and inconsistent with the answer to question 1 (b). It was further submitted that, as the finding in answer to question 2 was on the basis that the respondents were not occupiers, it could not avail the appellant (the respondents having been found to be occupiers), even if she succeeded in establishing some general duty of care owed to the deceased. It is unnecessary to consider these submissions because, for reasons which will be given, the appellant fails to establish a general duty of care.

D The authorities on the duty of occupier to licensee were considered by FARWELL, L.J., and HAMILTON, L.J., in *Latham v. R. Johnson & Nephew, Ltd.* (1) ([1913] 1 K.B. 398). FARWELL, L.J., quotes (*ibid.*, at p. 404) with approval a statement by WILLIAMS, J., in *Hounsell v. Smyth* (2) ((1860), 7 C.B.N.S. 731), adopted by WIGHTMAN, J., in *Binks v. South Yorkshire Ry. & River Dun Co.* (3) ((1862), 3 B. & S. 244 at p. 252):

E "No right is alleged: it is merely stated that the owners allowed all persons who chose to do so, for recreation or for business, to go upon the waste without complaint,—that they were not churlish enough to interfere with any person who went there. One who thus uses the waste has no right to complain of an excavation he finds there. He must take the permission with its concomitant conditions, and, it may be, perils."

F One recognised exception to this principle is that the occupier must warn the licensee of a danger of which he knows which is in the nature of a trap. HAMILTON, L.J., said ([1913] 1 K.B. at p. 415):

"It [a trap] involves the idea of concealment and surprise of an appearance of safety under circumstances cloaking a reality of danger."

G This exception led to the second question put to the jury. If there are no further applicable exceptions, the appellant fails on the basis that the deceased was a licensee.

H The appellant submitted that the respondents, although occupiers, were under a general duty to the appellant to take all reasonable steps for his safety having regard to the fact that they had some years before erected the board. If this is right, it has always been wrong to say that the plaintiff must take the land as he finds it. He has to take the land on this argument as he would have found it when the occupier went into occupation. In respect of changes made by the occupier, the latter's duty to a licensee on this argument is different and greater. Reliance was sought to be placed on *Slater v. Clay Cross Co., Ltd.* (4) ([1956] 2 All E.R. 625). In that case, the plaintiff was a licensee on the defendant's land which included a railway line and a tunnel. The learned judge found that the accident was due to the negligent driving of a train on the line. The danger did not arise out of the line or the tunnel but out of negligent driving. If an occupier negligently drove a motor car into a licensee, the principle that the licensee must take the land as he finds it would clearly have no application. Reliance was also placed on a further suggested exception. In *Mourton v. Poulter* (5) ([1930] 2 K.B. 183), the plaintiff, a boy of ten, was injured when a tree, which was being cut down, fell. The boy was a trespasser and the defendant

was a contractor, not the occupier. SCRUTTON, L.J., dealt, however, with the position of an owner (*ibid.*, at p. 191):

"The liability of an owner of land to trespassers does not arise where there is on the land a continuing trap, such as that which was considered in a case in the Supreme Court of the United States of an innocent looking pond which contained poisonous matter: *United Zinc and Chemical Co. v. Britt* (6) ([1922] 258 U.S. 268). There, as the land remains in the same state, a trespasser must take it as he finds it, and the owner is not bound to warn him. That, however, is a different case from the case in which a man does something which makes a change in the condition of the land, as where he starts a wheel, fells a tree, or sets off a blast when he knows that people are standing near. In each of these cases he owes a duty to these people even though they are trespassers to take care to give them warning."

In an earlier decision referred to in *Brock v. Copeland* (7) ((1794), 1 Esp. 203), the same principle was applied to a case in which the defendant having encouraged the public to go through his close was liable when damage was done by a bull which he had later put there without warning (see *Latham v. R. Johnson & Nephew, Ltd.* (1), [1913] 1 K.B. at pp. 406, 407: see also *Corby v. Hill* (8) (1858), 4 C.B.N.S. 556 at p. 563, and *Excelsior Wire Rope Co., Ltd. v. Callan* (9), [1930] A.C. 404). Such cases have no application to the present case. The spring board had been erected for years. The argument, unsupported by authority, fails in principle. The licensee must take the land as he finds it, and there could be no logic in drawing a distinction between its state when the occupier went into occupation and its state when changes had been made by him.

It was further submitted that the law as between licensor and licensee had no application because (i) there was no defect in the diving board as such and, therefore, it could not be regarded as a trap as there was no physical defect in the state or condition of the land, and (ii) the danger from its use or misuse at low tide was in the sea outside the area occupied. No authority was cited for the argument that different principles are applicable if the danger arises from the use of a part of the land not defective in itself. In principle it would involve a fine, and, in their Lordships' opinion, an illogical distinction. A trap as defined by HAMILTON, L.J., may consist in an invitation to use a non-defective appliance in a way which turns out to be dangerous. If a door opens over a big drop, it may be a trap if it looks as if it led into the next room. A bridge may be a perfectly good bridge though unsuited to carry more than a ton. If so, it may be a trap for a vehicle over a ton if there is no warning. On the second point, the fact that the concealed danger is that of injury outside the occupied area, whether in the sea or on a highway or in adjacent property on principle would not seem to prevent the application of the rule. In *Latham v. R. Johnson & Nephew, Ltd.* (1) FARWELL, L.J., gives as an obvious illustration, the owner of cliffs by the sea who would not be bound to fence them off ([1913] 1 K.B. at p. 405).

Finally, the appellant sought before the Court of Appeal of New Zealand and before their Lordships to base her claim on a submission that the deceased was not a licensee but either an invitee or a person to whom the respondents as a local authority owed a general duty of care. The principle invoked was adopted and applied by the Court of Session in *Plank v. Stirling Magistrates* (10) (1956 S.C. 92). The pursuer, a child of two and a half, was injured by falling from a chute erected by a local authority in a playground in a public park. The court held that the local authority was liable in damages on the ground that the child was an invitee and the danger was an unusual one of which the authority ought to have known. This was the ratio of the majority. LORD MACKINTOSH based his decision on the ground that the child was there as of

A right, and, therefore, entitled to rely on the chute being in a reasonably safe condition. The question whether, in principle, persons who are on premises provided by a local authority for the use of the public can or should, apart from authority, be treated as invitees has been discussed in a number of English cases (*Purkis v. Walthamstow Borough Council* (11), [1934] All E.R. Rep. 64 at p. 70; *Ellis v. Fulham Borough Council* (12), [1937] 3 All E.R. 454 at p. 456; *Baker v. Bethnal Green Corpn.* (13), [1945] 1 All E.R. 135 at p. 139; *Pearson v. Lambeth Borough Council* (14), [1950] 1 All E.R. 682). Their Lordships were also referred among other cases to *Aiken v. Kingborough Municipality* (15) ((1939), 62 C.L.R. 179), *Burrum Corpn. v. Richardson* (16) ((1939), 62 C.L.R. 214 at p. 379), and to the AMERICAN RESTATEMENT OF THE LAW OF TORTS, Vol. II, para. 347.

C The Court of Appeal of New Zealand decided that the point not having been taken at the trial could not be taken on appeal. BARROWCLOUGH, C.J., said ([1957] N.Z.L.R. at p. 62):

"She [the appellant] accepted that he was a licensee; and, if she had not accepted it, no doubt an issue somewhat differently framed would have been put to the jury."

D F. B. ADAMS, J., after considering certain cases, said (*ibid.*, at p. 66):

"Quite apart from the considerations already mentioned, this present case was pleaded and fought, and put to the jury on the footing that the deceased was a licensee, and for my part I do not see how the appellant could now be permitted to place her case on a different footing."

E In *Connecticut Fire Insurance Co. v. Kavanagh* (17) ([1892] A.C. 473), LORD WATSON, in delivering the judgment of their Lordships' Board, after referring to the raising of points of law in an appellate court on facts admitted and proved beyond controversy said (*ibid.*, at p. 480):

F "But their Lordships have no hesitation in holding that the course ought not, in any case, to be followed, unless the court is satisfied that the evidence upon which they are asked to decide establishes beyond doubt that the facts, if fully investigated, would have supported the new plea."

A similar statement will be found in LORD HERSCHELL's speech in *Tasmania (Ship Owners & Freight Owners) v. Smith etc., City of Corinth (Owners), The Tasmania* (18) ((1890), 15 App. Cas. 223 at p. 225).

G In an appeal in a case tried with a jury, the appellate court must also consider whether further questions would have been left to the jury, their answers to which remain uncertain. Apart from this principle, the matter is one of discretion for the appellate court, and their Lordships would be loth to interfere with the discretion as exercised by the Court of Appeal in the present case.

H There is a further consideration referred to by LORD BIRKENHEAD, L.C., in *North Staffordshire Ry. Co. v. Edge* (19) ([1920] A.C. 254 at p. 263):

I "The appellate system in this country is conducted in relation to certain well-known principles and by familiar methods. The issues of fact and law are orally presented by counsel. In the course of the argument it is the invariable practice of appellate tribunals to require that the judgments of the judges in the courts below shall be read. The efficiency and the authority of a Court of Appeal, and especially of a final Court of Appeal, are increased and strengthened by the opinions of learned judges who have considered these matters below. To acquiesce in such an attempt as the appellants have made in this case is in effect to undertake decisions which may be of the highest importance without having received any assistance at all from the judges in the courts below."

These observations should be read subject to the qualification stated in the speeches of LORD ATKINSON and LORD BUCKMASTER in the same case, but they

appear to their Lordships to apply with great force to the present appeal. For it is clear that points which would have plainly arisen if this point had been taken remain in doubt. Was this a public park to which the deceased had access as of right? The learned judge in his summing-up on the issue of occupancy says that the respondents had the "right of stopping people going there". The board was not apparently put up on the instructions of the respondents to attract the public but at the request of a swimming club to replace a previous board. If the deceased was to be considered as an invitee, one would have expected a question put to the jury whether the danger of shallow water at low tide was an unusual danger. It is not certain how this question would have been answered.

The reasons given for dismissing the appeal are in substance those given by the Court of Appeal. Their Lordships thought it right to deal with the issues in some detail having regard to the full arguments addressed to them on each side.

Their Lordships will humbly advise Her Majesty that the appeal be dismissed.

Appeal dismissed.

Solicitors: *Arnold, Fooks, Chadwick & Co.* (for the appellant); *Wray, Smith & Co.* (for the respondents).

[*Reported by G. A. KIDNER, Esq., Barrister-at-Law.*]

TONKIN v. RAVEN.

[QUEEN'S BENCH DIVISION (Lord Parker, C.J., Streatfeild and Diplock, JJ.), October 22, 1958.]

Shops—Sunday closing—Shop where several trades or businesses carried on—Whether failure to display notice stating purpose for which shop is open is offence under Shops Act, 1950, s. 50 or s. 47—Shops Act, 1950 (14 Geo. 6 c. 28), s. 47, s. 50, s. 53, s. 55, s. 57.

By the Shops Act, 1950, s. 47, "Every shop shall, save as otherwise provided by [Part 4] of this Act, be closed for the serving of customers on Sunday". By s. 50 of the Act and the Shops Regulations, 1937, where several trades or businesses are carried on in the same shop, and the trade or business consists only of certain transactions, the shop is entitled to remain open on Sunday subject to certain conditions which include the exhibition of notices.

The respondent, who was the occupier of a shop at which the retail trade or business of general stores was carried on, was charged with having failed to comply with the provisions of s. 50 of the Shops Act, 1950, in that notices were not displayed as required thereby and by regulations made thereunder.

Held: s. 50 of the Shops Act, 1950, was a permissive enactment which did not create an offence, but was an exemption to s. 47 which alone created an offence; the charge, accordingly, was wrongly laid.

Per STREATFEILD and DIPLOCK, JJ.: Section 53, s. 55 and s. 57 of the Shops Act, 1950, create separate offences, apart from s. 47.

[**Editorial Note.** The prohibition enacted by s. 47 of the Shops Act, 1950, is discussed in 17 HALSBURY'S LAWS (3rd Edn.) 203 and the exemption made by s. 50 is stated at p. 205, para. 341. Those sections respectively replaced s. 1 and s. 4 of the Shops (Sunday Trading Restrictions) Act, 1936. Comparable provisions concerning closing for weekly half-holidays were to be found in s. 4 and s. 10 of the Shops Act, 1912, now replaced by s. 1 and s. 13 of the Act of 1950.

For the Shops Act, 1950, s. 47 and s. 50, see 29 HALSBURY'S STATUTES (2nd Edn.) 229, 230.]

A Case Stated.

This was a Case Stated by justices for the County Borough of East Ham in respect of their adjudication as a magistrates' court sitting at East Ham. On Mar. 25, 1958, an information was laid against the respondent, Bertie Raven, that on Sunday, Jan. 19, 1958, he, the occupier of a shop or place at which the retail trade or business of general stores was carried on, situated at 301, Church Road, E.12, within the district of the County Borough of East Ham, failed to comply with the provisions contained in the Shops Act, 1950, s. 50, and regulations made thereunder, in that notices as required by s. 50 and the regulations were not displayed stating the purpose for which the shop was open, contrary to s. 50 and the regulations. The respondent did not appear. At the commencement of the proceedings the court had intimated to the appellant, Douglas George Tonkin, Chief Shops Act Inspector on behalf of the council of the County Borough of East Ham, that, in the view of the justices, there appeared to be no offence known to the law disclosed in the summons, and accordingly the hearing was adjourned sine die to give the appellant an opportunity to seek instructions and advice in the matter. On the appellant's application the matter was restored to the list for hearing a fortnight later. The respondent did not appear at the adjourned hearing which took place on May 20, 1958.

It was contended by the appellant that s. 50 of the Shops Act, 1950, created an offence. If a shopkeeper kept his shop open on a Sunday and that shop carried on several trades, if a notice in the prescribed form was not exhibited the shopkeeper was liable to be proceeded against for failing to display that notice under s. 50. The penalty for such an offence was to be found in s. 59 of the Act.

The justices were of opinion that (a) if an offence were to be alleged, it should be contravention of s. 47 of the Shops Act, 1950, which prohibited the opening of a shop on a Sunday with certain exceptions; (b) s. 50 was created in order to allow occupiers of shops carrying on a mixed trade and opening on a Sunday to do so and was, therefore, an exempting section from prosecutions under s. 47, provided such a notice was exhibited; and (c) if such a notice was not exhibited in a shop carrying on a mixed trade and remaining open on a Sunday, then an offence was committed under s. 47. Accordingly, the justices dismissed the information, and the appellant now appealed.

Paul Wrightson for the appellant.

The respondent did not appear and was not represented.

LORD PARKER, C.J.: This is a Case Stated by justices for the County Borough of East Ham, before whom the respondent was charged with an offence against the Shops Act, 1950. The charge was in this form: that he being

"the occupier of a shop or place at which the retail trade or business of general stores was carried on, situated at 301, Church Road, E.12, within the district of the council, did fail to comply with the provisions contained in s. 50 of the Shops Act, 1950, and regulations made thereunder in that notices as required by s. 50 of the Shops Act, 1950, and regulations made thereunder were not displayed stating the purpose for which the shop was open, contrary to the said provisions of the said Act."

This is a case where one has the greatest sympathy with magistrates. The respondent did not appear. There was no argument on his side, and they were faced with advice from their clerk that this charge disclosed no offence in law. They came to the conclusion that there was something in this and they adjourned the hearing in order that the present appellant, who was the Chief Shops Act Inspector, might consider the matter. The matter was argued and, in the end, the magistrates decided that the charge was wrongly laid and dismissed it. This is a highly technical point of course, but it may be none the less

a good one, and it depends on the true construction of a few sections of the Shops Act, 1950. A

Section 47 provides:

"Every shop shall, save as otherwise provided by this Part* of this Act, be closed for the serving of customers on Sunday . . ."

Then there is a proviso, but I do not think that, for the purposes of this case, I need go into the proviso and exactly what is meant by it. Section 50 provides something which is an exception to s. 47, and is in these terms: B

"Where several trades or businesses are carried on in the same shop and any of those trades or businesses consist only of transactions of such a nature that, if they were the only transactions carried on in the shop, the provisions of this Part of this Act requiring the shop to be closed for the serving of customers for the whole or any part of Sunday would not apply to the shop, the shop may be kept open for the whole or any part of Sunday, as the case may be, for the purposes of those transactions alone, subject, however, to such conditions as may be prescribed." C

The type of transactions in question are set out in Sch. 5 to the Act; for certain transactions a shop is entitled to remain open. In the case of these multiple businesses, if the trade consists only of transactions which come within Sch. 5, the shop may be kept open for those transactions alone, subject to conditions prescribed, and conditions were prescribed under the preceding Shops (Sunday Trading Restriction) Act, 1936†, and are to be found in the Shops Regulations, 1937 (S.R. & O. 1937 No. 271). They provide that, as a condition of remaining open under s. 50, which was then s. 4 of the Act of 1936, two conditions should be fulfilled, (i) the exhibition of certain notices and (ii) that no goods should be exhibited other than goods for which the shop could lawfully be kept open. By the Act of 1950‡, those regulations continued and are the relevant regulations in this case. All that I need refer to finally is s. 59 (1), which provides for penalties: D

"In the case of any contravention of any of the foregoing provisions of this Part of this Act, the occupier of the shop shall be liable to a fine . . ."

A scale of fines is then set out. E

The short point here is whether the charge in this case was properly laid as an offence against s. 50 of the Act and the regulations, and the magistrates took the view that it should have been laid under s. 47. Counsel for the appellant has taken us back to the Shops Act, 1912, where what is now equivalent to s. 50 of the Act of 1950 was made an express proviso to s. 4 (1) of the Act of 1912, which corresponds with the present s. 47, and s. 4 of the Act of 1912 by sub-s. (7) laid down the offence. In other words, under the original scheme of legislation in s. 4 of the Act of 1912, one found a self-contained code of general prohibitions, the exemptions to them and the penal provision. He argues that the scheme here is a different one. There may be offences against s. 47 and also against the following sections, in particular s. 50. The contravention of the subsequent sections, including s. 50, are themselves, he contends, separate offences, and he relies in particular on the wording in s. 59 (1) to which I have referred, "In the case of any contravention of any of the foregoing provisions of this Part of this Act . . ." F

Paying all due regard to that, I find it is quite impossible to say that s. 50

* Part 4, which is headed "Sunday Trading". Section 47 to s. 59, inclusive, are in this Part of the Act.

† The Act of 1936 was repealed by the Act of 1950.

‡ See the Shops Act, 1950, s. 76 (2). G

- A** creates any offence at all. If one reads it as I have done, it is clear that it is merely a permissive section subject to certain conditions, and I cannot see how a permissive section of itself can create an offence. There must be some proceeding which does create the offence to which the permissive section is an exemption, and, for my part, despite the present lay-out of the Act of 1950, I am constrained to feel that the position is exactly the same as it would have been under the Act of 1912. Counsel concedes that, under that Act, a charge would have to be preferred of an offence contrary to what was then s. 4 (1) and is now s. 47. I think that the magistrates properly applied their minds to this question and came to a correct decision in law, and I would dismiss this appeal.

C **STREATFEILD, J.:** I agree. In my view the starting-point for the construction of this Act is the words of s. 47 to the effect:

“Every shop shall, save as otherwise provided by this Part of this Act, be closed for the serving of customers on Sunday . . .”

- D** that is to say, there is a complete embargo on the opening of any shop on Sundays unless it is otherwise provided. There is a proviso to s. 47, where it is otherwise provided immediately, namely, that shops which come within Sch. 5 to the Act are exempt from this provision. One then passes to s. 50 which, as my Lord has pointed out, is a purely permissive section, and, on the question of construction, it is difficult to see how a permissive section is one which can create in itself an offence. To my mind, s. 50 means no more than this, that, in the case where several trades or businesses are carried on in the same shop and any one of those trades consists only of transactions and they were the only ones to which this Part of the Act would not apply, then the shop may obtain exemption provided it complies with the regulations. That, to my mind, simply creates another exception to s. 47, which is the governing section creating the offence. It is quite true that the lay-out of this Act is different from the Shops Act, 1912, inasmuch as there is no penalty clause in s. 47. That is reserved for s. 59 (1) of the Act which lays down certain penalties “In the case of any contravention of any of the foregoing provisions of this Part of this Act . . .” Counsel for the appellant pointed out to us that there are no other sections to which that could apply unless s. 50 creates another offence as well as s. 47. Without the matter having been fully argued, I should be inclined to the view that s. 53, dealing with professors of the Jewish faith, might in itself create a separate offence against this Act, as it seems s. 57, dealing with notices, again might create a separate offence from s. 47; and I have since noticed s. 55, which clearly would create a different offence of delivering goods to customers on occasions when the shop would not otherwise be open for the service of customers. It seems to me that those are other instances of offences which are separate from s. 47, and which are all collected together so far as penalty is concerned under s. 59 of the Act.

- I** I have come to the conclusion here that the real offence, if any, which was committed was the offence of remaining open on Sunday, contrary to s. 47, because, by reason of the failure to display the notices, in other words to observe the conditions laid down in the regulations under s. 50, the respondent has not brought himself within the exception visualised by s. 50. In my judgment, the justices were quite right in saying that the offence here, if any, was under s. 47 rather than under s. 50; and for those reasons I think this appeal should fail.

DIPLOCK, J.: For the reasons given by both of my brethren I agree. Section 47 of the Shops Act, 1950, is a difficult section, but, however difficult it may be, when regard is had not only to s. 50 but also to s. 48, s. 49 and s. 51, each of which provides that shops may be open in certain circumstances and are

permissive, I think that s. 50 must be permissive. I also agree with my brother STREATFIELD, J., that there are other offences, such as s. 53 (1) (a), s. 55 and s. 57 which are covered by s. 59 of the Act.

Appeal dismissed.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *R. H. Buckley*, East Ham (for the appellant).

[*Reported by G. A. KIDNER, ESQ., Barrister-at-Law.*]

INDEPENDENT ORDER OF ODD FELLOWS MANCHESTER UNITY FRIENDLY SOCIETY *v.* MANCHESTER CORPORATION.

[COURT OF APPEAL (Lord Evershed, M.R., Sellers and Pearce, L.J.J.), October 8, 9, 10, 16, 1958.]

Rates—Limitation of rates chargeable—Hereditament occupied for purposes of friendly society—Society not established or conducted for profit—Society's benefits payable to non-members—Whether an organisation whose main objects were concerned with the advancement of social welfare—Rating and Valuation (Miscellaneous Provisions) Act, 1955 (4 & 5 Eliz. 2 c. 9), s. 8 (1) (a), (2).

The objects of a registered friendly society, which were set out in one of the rules under thirteen heads, were to provide for payment of insurance benefits to members, and also benefits for the relief and maintenance of members and certain non-members, viz., substantially, the families of members. Benefits were calculated and paid on an actuarial basis, but the society, which had built up large reserves, distributed annually substantial sums (between £200,000 and £300,000 out of an income of £1,700,000) in discretionary benevolence for the benefit of members and their dependants. The society's income was mainly derived from members' contributions and from accumulated funds, a relatively small amount being received from other sources which included donations. The society was not established or conducted for profit. It was conceded that the society was not charitable. On the question whether the rates on a hereditament occupied by the society should be limited pursuant to the Rating and Valuation (Miscellaneous Provisions) Act, 1955, s. 8 (2), on the ground that the society was an organisation whose main objects were concerned with the advancement of social welfare within s. 8 (1) (a) of that Act,

Held: in order to bring itself within s. 8 (1) (a) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, the society must show that all its main objects (not merely some of them) were directed to the advancement of social welfare, one essential characteristic of which was the quality of altruism (see p. 381, letter I, p. 384, letter D, and p. 385, letter I, post); but a main object, if not the main object, of the society was sickness and life insurance on what was substantially a business basis and, therefore, despite the element of discretionary benevolence in the distribution of voluntary payments, the society was not within s. 8 (1) (a) and the amount of rates chargeable in respect of the hereditament was not limited by s. 8 (2).

National Deposit Friendly Society (Trustees) v. Skegness U.D.C. ([1958] 2 All E.R. 601) followed.

General Nursing Council for England and Wales v. St. Marylebone Corpn. ([1957] 3 All E.R. 685) applied.

Decision of the DIVISIONAL COURT ([1957] 3 All E.R. 310) affirmed.

- A [For the Rating and Valuation (Miscellaneous Provisions) Act, 1955, s. 8, see 35 HALSBURY'S STATUTES (2nd Edn.) 394.]

Cases referred to:

- (1) *National Deposit Friendly Society (Trustees) v. Skegness U.D.C.*, [1957] 3 All E.R. 199; *affd.* H.L., [1958] 2 All E.R. 601.
- B (2) *Derbyshire Miners' Welfare Committee v. Skegness U.D.C.*, [1957] 3 All E.R. 692; 3rd Digest Supp.
- (3) *Re Buck, Bruty v. Mackey*, [1896] 2 Ch. 727; 65 L.J.Ch. 881; 75 L.T. 312; 60 J.P. 775; 8 Digest (Repl.) 356, 348.
- (4) *General Nursing Council for England and Wales v. St. Marylebone Corpn.*, [1957] 3 All E.R. 685; 3rd Digest Supp.

C Appeal.

This was an appeal by the ratepayers from a decision of the Divisional Court dated Oct. 16, 1957, and reported [1957] 3 All E.R. 310, allowing an appeal by the Manchester Corporation by way of Case Stated by N. J. LASKI, Esq., Q.C., Recorder of Liverpool, in respect of his adjudication as a court of quarter sessions sitting at Manchester on Jan. 3, 1957. The Divisional Court held that

D the main objects of the Independent Order of Odd Fellows Manchester Unity Friendly Society were not concerned with the advancement of social welfare within the Rating and Valuation (Miscellaneous Provisions) Act, 1955, s. 8 (1) (a), and, therefore, that the society was not entitled to the benefit of the limitation of rates afforded by s. 8 (2) of that Act.

- E *Sir Andrew Clark, Q.C.*, and *C. N. Glidewell* for the society.
G. D. Squibb, Q.C., and *F. P. R. Hinchcliffe* for the rating authority.

Cur. adv. vult.

Oct. 16. LORD EVERSHERD, M.R.: I will ask PEARCE, L.J., to deliver the first judgment.

- F The following judgments were read.

PEARCE, L.J.: The appellants are the Independent Order of Odd Fellows Manchester Unity Friendly Society (hereinafter referred to as "the society") who occupy premises in Manchester. The rate imposed on those premises took no account of the relief afforded by the Rating and Valuation (Miscellaneous Provisions) Act, 1955, s. 8, to premises occupied by certain organisations. The

G society claims that it is within that section and that therefore the premises are entitled to such relief. It appealed successfully to the Crown Court of Manchester, which held that it came within s. 8. On appeal by Case Stated to the Divisional Court that decision was reversed and the society now appeals to this court.

The words of s. 8 (1) which are relevant to this appeal are these:

- H "This section applies to the following hereditaments, that is to say—(a) any hereditament occupied for the purposes of an organisation (whether corporate or unincorporate) which is not established or conducted for profit and whose main objects are charitable or are otherwise concerned with the advancement of religion, education or social welfare."

- I It is conceded by the rating authority that the society is not established or conducted for profit in view of the decision of the House of Lords in *National Deposit Friendly Society (Trustees) v. Skegness U.D.C.* (1) ([1958] 2 All E.R. 601). It is conceded by the society that its main objects are not charitable within the meaning of the Act. This appeal turns on whether the society can show that its main objects are concerned with the advancement of social welfare. If so, its premises are entitled to relief under the section, and this appeal succeeds.

The society was founded in 1851, and in that year was registered under the Friendly Societies Acts. It has various classes of members and many branches.

The total number of members is about six hundred thousand. The objects of the society are defined in the rules of the society. Prima facie we must look at those rules in order to ascertain the main objects of the society; but where those rules are not clear or decisive the court is entitled to and must consider the actual practice of the society. The book of rules of the society, and the latest available reports dated November, 1955, and March, 1956, are exhibited to the Case Stated and certain relevant facts of the society's practice are carefully set out in the Case Stated.

In *National Deposit Friendly Society (Trustees) v. Skegness U.D.C.* (1) the House of Lords had to consider the case of a registered friendly society with about seven hundred thousand members whose objects were (to use the words of LORD KEITH OF AVONHOLM) (ibid., at p. 603):

"... to provide on a mutual basis for pecuniary benefits of relatively small amounts to be paid to its members on the ordinary chances and changes of human life, such as relief during sickness, provision of facilities in convalescent homes, old age pay and payments to a member's family in the event of his death."

There was also an insurance section providing on a mutual basis for whole life and endowment assurances for the benefit of members. There were certain qualifications for membership, certain restrictions being imposed as regarded health, occupation and age. All the above characteristics are shared by the society in the present appeal. The House of Lords held in that case that the society did not come within the terms of s. 8 since it was established entirely for the common benefit of its members and lacked the element of altruism or public benefit required by the section. Unless, therefore, the society in this case can show that its main objects differ materially from those of the *National Deposit Friendly Society* (1) it cannot succeed in this appeal. Counsel for the society submits that they do so differ by virtue of certain rules and activities which were absent in the *National Deposit Friendly Society* case (1) and that the difference is sufficient to enable this court properly to hold that the society's main objects are concerned with the advancement of social welfare.

There can be no doubt that there are material differences between the two cases. The question that we have to decide is whether those differences are great enough to distinguish this case from the *National Deposit Friendly Society* case (1), and to bring this society within the organisations defined by s. 8 (1) (a). The differences on which counsel relies are these. First, the benefits in the *National Deposit Friendly Society* case (1) were confined to members themselves, whereas the benefits of this society extend to the families and dependants of members. Secondly, the funds in that case were derived exclusively from members' compulsory contributions. Thirdly, the benefits in that case were calculated on an actuarial basis and thus there was an absence of unselfishness or benevolence, whereas in this case there is an element of discretionary benevolence over and above the actuarial minimum to which members are contractually entitled. The scheme of the society, he says, is that members are contractually entitled to benefits calculated actuarially on the amounts of their subscriptions, and that any surplus after those benefits is not divisible under contractual obligation but is used to provide purely discretionary benefits to members and their families in cases of hardship or need by augmenting contractual benefits and by making payments of a purely personal nature to members or their families: such benefits are eleemosynary in character and outside the purposes of any mutual assurance. There was no such element in the *National Deposit Friendly Society* case (1). He contends that the main objects of this society are the relief or maintenance of members and their families in sickness, in poverty, in distress, in old age and in time of unemployment. All these objects must be the advancement of social welfare. He stresses the element of fraternity throughout which is the basis of rules dealing with the various rituals. The fact (he argues) that the

A means by which those objects are attained is very largely a system of insurance, designed, in addition to contractual benefits, to provide a surplus for the exercise of benevolence, does not prevent the main objects being the advancement of social welfare although it does prevent them from being charitable in the strict sense. The objects are fraternal and benevolent. The insurance is the means, not the end.

B Admittedly the restriction of the benevolence to members and their families is an element to be considered, but in view of the number and wide dispersal of the society's members, he relies on the decision of this court in *Derbyshire Miners' Welfare Committee v. Skegness U.D.C.* (2) ([1957] 3 All E.R. 692) as showing that such limitation does not prevent the objects of a society from coming within s. 8, and *Re Buck, Bruty v. Mackey* (3) ([1896] 2 Ch. 727, later approved in this court)

C as showing that such benevolence on the part of a friendly society, though confined to a severely restricted class, may be a charity.

Counsel for the rating authority contends that the society, looked at as a whole, has for its main objects the insurance of its members. The *National Deposit Friendly Society* case (1) shows that those objects do not come within s. 8. He canvasses various rules and facts in the case to show that benevolence is incidental rather than essential. Assuming, without conceding, that some of the main

D objects (e.g., the discretionary administration) are benevolent, the society still does not come within the section. When the Act says the "main objects", it means all the main objects, not one of them or some of them. For this he relies on *General Nursing Council for England and Wales v. St. Marylebone Corpn.* (4) ([1957] 3 All E.R. 685), a decision of this court, as showing that a society which

E had two main objects, one of which was for the advancement of social welfare and one for the benefit of the members, did not come within the section.

We were referred to a number of cases which have decided whether particular organisations come within s. 8 of this Act. The words of the Act are wide and general and it is not easy to decide whether particular cases do or do not fall within those words. Decisions in other cases are not necessarily a guide to what

F is the correct decision on the facts of a particular case. It seems to be established that the words "or . . . otherwise [for] the advancement of . . . social welfare" were intended to connote something more than the mere distribution of money or money's worth simpliciter, even although such distribution rarely fails to be beneficial to the recipient and in that sense to promote his welfare as a member

G of society. The words seem to me to connote something less material, something of the spirit. This is well expressed by LORD EVERSHERD, M.R., giving the judgment of the court in *General Nursing Council for England and Wales v. St. Marylebone Corpn.* (4) ([1957] 3 All E.R. at p. 691):

"But, if we can add anything to illustrate the limitation which, we think, should in this context be put on social welfare, it would be that the

H phrase involves at any rate the conception of what used to be called 'good works': the notion of things that, as a matter of social obligation, ought to be done for the benefit of those in the community whose living conditions in those respects are inadequate. We suggest this, not by way of definition, but only as an indication why, in our judgment, the advancement of social

I welfare ought not to be equated with the promotion, generally, of the well-being, in every sense and of every kind, of society or sections of society; why, therefore, everything which can be shown to tend to the public advantage cannot, for the purposes of the section, be treated as concerned with the advancement of social welfare . . ."

Further, the words "main objects" must, in my opinion, mean in substance all the main objects. The test is this. When one looks at the society fairly as a whole, can it be said that its main objects (not merely one or some of its main

objects) are concerned with (i.e., directed to) the advancement of social welfare ? A
Rule 2 defines the objects of the society. It reads:

"The objects of the society shall be: To provide by entrance fees, contributions of the members, fines, donations, levies, and interest on capital for—(a) Insuring a sum of money to be paid on the death of a member or of a member's wife or husband or, subject to s. 2 of the Act of 1948, of a parent, step-parent or grand-parent of a member or, subject to s. 1 of the said Act, for the funeral expenses of a member's child or of the widow of a deceased member. (b) Insuring a sum of money to be paid on the birth of a member's child. (c) The relief or maintenance of the members, or in the cases hereinafter, or in the rules of any branch, provided, the wives, children, fathers, mothers, brothers or sisters, nephews or nieces, or wards being orphans or members, during sickness or other infirmity, whether bodily or mental, in old age, or in widowhood. (d) The relief or maintenance of the orphan children of members during minority. (e) Providing proper medicine and medical attendance for members. (f) Granting temporary assistance to the widows and children of deceased members. (g) Providing members with assistance when travelling in search of employment. (h) Assisting members when in distressed circumstances, and for making grants to members who may be incapacitated by accident from following their usual employment. (i) Assisting branches unable to meet their engagements. (j) The endowment of members at any age. (k) Guaranteeing the performance of their duties by the officers and servants of the Order or of any branch thereof. (l) To provide convalescent treatment and to provide and maintain convalescent homes. (m) Insuring, to members of the Jewish persuasion, the payment of a sum of money during the period of confined mourning."

Some of those objects are, in vacuo, charitable. Some may be charitable.

The income of the society is derived from contributions (using that word to describe what the members are bound to contribute to secure their benefits) and also from fines, donations and levies. Persons join the society and contribute to its funds in order to obtain for themselves or for the class of persons mentioned in r. 2 (c) such benefits as the society disburses under its rules as of right or by way of discretion. The benefits available to members as of right are only payable provided the contributions of such members have been paid or dealt with in accordance with the rules. Rule 156 shows that members have to be proposed, elected and initiated with a ceremony whose ritual is designed to stress the fraternal nature of the bond; but the declaration which has to be signed by a candidate shows a concern with those matters such as his health and that of his wife, whether he is temperate, whether he or his parents have suffered from pulmonary disease, a concern which is normally associated with ordinary commercial insurance.

The rules provide for the formation of various funds for benevolent purposes: an orphan gift fund (partly from donations and partially from a levy), a convalescent home fund, a war distress fund. Rule 70 provides that, when a surplus of assets over liabilities is shown at a quinquennial valuation, the surplus may be appropriated to these benevolent funds (r. 70 (9)) or to funds for providing various additional benefits for the member or his wife (r. 70 (10)). These are discretionary in character. In 1954 the funds were about £34,000,000, and the surplus, namely, £3,801,000 was appropriable in accordance with r. 70. At least £1,000,000 has been so appropriated, a sum which, spread over the five-year period, represents an average of £200,000 a year. In order to see the perspective the following figures are useful. The accounts are not easy to follow, but it emerges on analysis that the society's income is about £1,700,000 (of which donations and sources other than interest on capital and contributions produce £56,000, which is about three per cent. of the total) and its expenditure is about £1,600,000. So far as I can

A see from the accounts, the discretionary benevolent distributions are between £200,000 and £300,000 per annum. Those to whom they are distributed are the members or their families or dependants who qualify as beneficiaries of the benevolence through the contractual link between the society and the member. The distributions are none the less discretionary acts of benevolence.

B Such is the general outline of the organisation in respect of which we have to decide whether its main objects are the advancement of social welfare, starting with the premise that mutual insurance against the vicissitudes of life is not concerned with the advancement of social welfare. I accept that *an* object of the society is benevolent and discretionary succour to members and their families according to their need, and that *an* object of the society is the instilling into members by ritual or otherwise of a feeling of fraternity that goes beyond the
C mere mutuality of a financial interest in one another or the esprit de corps normally promoted by a large business enterprise. Whether these can be properly styled "main objects" I feel some doubt. The main and dominant objects appear to me to be mutual insurance of the members and the benefits to which they are entitled as of right. These are not the means to a benevolent end: they are the end itself. I do not wish to belittle the benevolent and fraternal objects
D to which I have alluded. They are, no doubt, of the utmost importance to some members and not unimportant to the majority, but they are not the main objects of the society. Therefore, in my view, the society is not one whose main objects are concerned with the advancement of social welfare. I would, therefore, dismiss this appeal.

E **LORD EVERSHERD, M.R.:** In light of the judgments already pronounced on the imprecise formula of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, which are binding on this court, and particularly of the decisions of this court and the House of Lords in *National Deposit Friendly Society (Trustees) v. Skegness U.D.C.* (1) ([1958] 2 All E.R. 601), counsel for the society felt constrained to present the case for the appellants (hereinafter referred to as "the society") as one which could and should be distinguished from the *National Deposit Friendly Society* case (1) on the ground that, notwithstanding the common mutual insurance characteristic, certain of this society's rules, having no counterpart in the National Deposit Society's constitution, imported an eleemosynary or benevolent quality of sufficient significance to give to the society a "social welfare" complexion distinct from the purely "business" colour of the National
G Deposit Society. Thus counsel emphasised the rules relating to the benevolent committee (r. 21), the orphan gift fund (r. 28), the unity distress fund (r. 35), the convalescent home benefit fund (r. 34 in the amending rules), the unity war distress fund (r. 35a), meritorious service pensions (r. 38a), Collins memorial fund (r. 38b); the rules relating to the appropriation of surplus capital (r. 70), to Odd Fellows' Halls (r. 79), and to ritual and regalia (r. 82); and the special district
H and lodge rules relating to the district distress funds (r. 107b) and lodge benevolent funds (r. 163) respectively. Founding himself on such considerations and on the terms of the objects rule (r. 2) itself, counsel for the society forcibly contended that the benefits and purposes of the society were not confined, as were those in the *National Deposit Friendly Society* case (1), to the provision of such disability and other like payments to members only and as a matter of contractual
I right, but extended to payments that are supplementary and discretionary and to persons other than members, viz., persons who may broadly be classed as the families of members. Counsel for the society further drew attention to the circumstances that the income of the society is not exclusively derived from contributions (or from the very substantial investments made from savings) but includes voluntary donations and that purely charitable grants are within the power of the society's trustees; and he finally and most naturally emphasised that the provisions as to initiation and the like showed that those who joined the

society must be taken to accept an ethical consideration of brotherhood as a basis of their association. A

I am far from saying that these matters do not constitute an important addition or qualification to what may be called the "business" aspect of the association (viz., mutual insurance) which is comprised in the first of the objects enumerated in r. 2. But I have come to the conclusion on the whole that they would not justify us in distinguishing this case from the *National Deposit Friendly Society* case (1) according to the principles therein laid down. I shall not, I hope, be thought unappreciative of the arguments put to us if I express my conclusion shortly. To do otherwise would inevitably involve some further attempted exposition of the Parliamentary formula and thereby add to the citations in the other cases (not likely to be few) which will have to be considered—a process which would not, I think, be to the public benefit, tending to substitute argument on the judgments of the courts for application of the few words, simple if elusive, "... whose main objects are ... concerned with the advancement ... of social welfare". The opinion of the noble Lords rejecting the appeal of the *National Deposit Friendly Society*, and the judgment of this court in the same case expressed by PARKER, L.J., have emphasised the significance—and the limiting effect—of the words "concerned with the advancement of": the main objects (and not merely some of them) must be directed to the furtherance or promotion of social welfare, that is, as an end or an altruistic conception. See, e.g., the speech of LORD KEITH OF AVONHOLM ([1958] 2 All E.R. at p. 607): B C D

"The desire for protection in time of need is the common bond that has brought them together. That is a most laudable object, but I find it impossible to distinguish their organisation in any essential respect from any mutual insurance society which provides similar, if more enlarged, benefits for a wider and more diverse cross section of the community." E

LORD MACDERMOTT, in the same case, said (*ibid.*, at p. 609):

"The principle, as I understand it, is that a valid charity must be substantially altruistic and benevolent in its purposes. That quality, which is, of course, but one facet of legal charity, appears to me to be reflected in the word 'advancement' as used in the paragraph in question, for there it seems clearly to be used as it is commonly used in relation to what is charitable, and, so used, I think it must be construed as implying a desire to do good to others. If, then, as I would hold, that is the nature of the quality which links and runs through the categories mentioned in s. 8 (1) (a), it remains to inquire whether the objects of the society possess or lack this quality." F G

In my judgment the society fails to satisfy the test. The learned recorder fairly summarised the purposes of those who join the society in para. 2 (p) of the Case Stated: H

"That persons joined the society and contributed to its funds in order to obtain for themselves or for such class of persons as mentioned in (m) above such benefits as the society disbursed under its said rules as of right or by way of discretion." I

Highly laudable though the society's main objects be, they at least significantly include mutual insurance for protection in time of need and in my opinion the result is not affected for present purposes by the fact that the benefits may extend to his family as well as to the member and may not be confined to the contractual minima.

Counsel for the society in his reply urged that the main objects of the society were relief of members (and their families) in sickness, poverty and distress, and their maintenance in old age and when out of work, and that the mutual insurance

A characteristics were but means to those ends. But such an analysis would surely be no less capable of invocation in a case strictly comparable to the *National Deposit Friendly Society* case (1). To treat the mutual insurance characteristics as "means" only is, in my judgment, to disregard the words "concerned with the advancement of . . .", which the House of Lords has held to be essential to the proper application of the statute. I agree, accordingly, that the appeal should be dismissed.

C **SELLERS, L.J.:** The resemblance of the present case to that of the *National Deposit Friendly Society (Trustees) v. Skegness U.D.C.* (1) ([1958] 2 All E.R. 601) is apparent and the argument has been developed very largely by both sides by making a comparison, on the society's side to emphasise the differences, on the rating authority's to demonstrate the similarities, in the two cases. It is not perhaps the most attractive way of considering a case, but, as the law has so recently been reviewed and pronounced by the House of Lords and the Court of Appeal in the cases which have been cited, it seems to me to be not only permissible and reasonable but also necessary to do so.

D Counsel for the rating authority relied strongly on r. 156, which, if not, as they asserted it was, the key to the whole matter, does show that a main and outstanding object of the society is insurance on a contractual basis. Rule 156 (1) is as follows:

E "Any person of good character, sound health, and within the age limits applicable to the respective tables contained in the general rules, or as stated in the lodge or district special rules, may become a member."

Sub-rule (2) contains a form of declaration to be signed by every candidate for admission to the society which includes an affirmation:

"that I am not afflicted with any hereditary disease tending to cause prolonged sickness or to shorten life"

F and in respect of a candidate's wife "... that she is also of sound bodily health and good constitution". Sub-rule (3) requires that the declaration must be accompanied by a certificate of health signed by a medical practitioner if it is required by district or lodge. Sub-rule (5) deals with the candidate's wife's health, and in sub-rule (6) there is a form of declaration in lieu of a medical certificate, requiring answers to questions all directed to the applicant's health or the health of his parents or family, and the last question is (g):

"Have you ever been admitted, or proposed to be admitted, a member of this or any other sickness benefit society?"

H It would seem on the information available and viewed as a whole that the main activity of the society is sickness and life insurance of the members and through them of their families and specified classes of relatives.

I In the conduct of this class of business over the years, with a care and prudence commonly associated with such insurance on a purely business basis, the society has built up reserves of no less than £34,000,000. I would not seek to belittle the society's purely benevolent provisions, which are substantial in terms of money; but they have been sufficiently restrained year by year to permit this great accumulation of capital. Even the substantial voluntary payments go unaccompanied, it would seem, by any friendly or neighbourly ministrations of an individual or personal character and, therefore, lack a not unimportant element in social welfare.

As it has been laid down that all the main objects must fulfil one or other of the requirements of s. 8 (1) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, in order to bring the hereditament within the provisions for special relief, then I think this society fails to qualify. It cannot be held, in my view, in

the light of the decided cases, that all the main objects of the society are "otherwise concerned with the advancement of social welfare". I add these observations to the judgments of my Lords, which I have read and with which I agree. I would dismiss the appeal. A

Appeal dismissed. Leave to appeal to the House of Lords granted.

Solicitors: *Forsythe, Kerman & Phillips*, agents for *John Gorna & Co.*, Manchester (for the society); *Sharpe, Pritchard & Co.*, agents for *Town clerk*, Manchester. B

[*Reported by F. GUTTMAN, ESQ., Barrister-at-Law.*] C

Re AN INTENDED ACTION BETWEEN PHILLIPS AND PRICE AND ANOTHER.

[CHANCERY DIVISION (Harman, J.), October 7, 8, 1958.] D

Landlord and Tenant—Repair—Breach of covenant—Leave to institute proceedings—Conditions to be satisfied before leave may be given—Clearance order and compulsory purchase order made by local authority—Leasehold Property (Repairs) Act, 1938 (1 & 2 Geo. 6 c. 34), s. 1 (5), as amended by the Landlord and Tenant Act, 1954 (2 & 3 Eliz. 2 c. 56), s. 51 (2) (c) and (d).

Landlord and Tenant—Repair—Breach of covenant—Expenses of landlord in relation to breach—Declaration on grant of leave to institute proceedings—Law of Property Act, 1925 (15 & 16 Geo. 5 c. 20), s. 146 (3)—Leasehold Property (Repairs) Act, 1938 (1 & 2 Geo. 6 c. 34), s. 2. E

Paragraphs (a)-(e) of s. 1 (5)* of the Leasehold Property (Repairs) Act, 1938, are alternatives, each to the other; consequently, where leave to take proceedings to enforce a repairing covenant in a lease within that section is sought, leave may be given if the landlord proves that the conditions of any one of paras. (a)-(e) are satisfied. F

By a lease, dated May 1, 1883, property consisting of a tenement building containing twelve flats was demised for a term of eighty years from Sept. 29, 1882, at a rent of £26 yearly. By an assignment dated Aug. 23, 1937, P. acquired the remainder of the term demised by the lease. In 1954 the reversion was conveyed to the present landlord for the sum of £275. On Apr. 1, 1955, the landlord served on P. a notice of breach of the lessee's repairing covenants contained in the lease, with a schedule of dilapidations priced at about £5,000. On Apr. 14, 1955, P. served on the landlord a counter-notice under s. 1 of the Leasehold Property (Repairs) Act, 1938, claiming the benefit of the Act. On Feb. 21, 1956, P. assigned his leasehold interest to a company of no substance, of which his family were the directors and he was the secretary. Notice of the assignment was given to the landlord. In October, 1956, the landlord served a notice of breach of the repairing covenants on the company and the company then served on him a counter-notice under s. 1 of the Act of 1938. In April, 1957, an area, which included the property, was declared a clearance area by the local authority, and on Nov. 20, 1957, a compulsory purchase order was made, but at the time of the hearing this had not yet been confirmed. The twelve flats were all occupied by sub-tenants, the rents being between £20 and £40 yearly. The value of the site as a cleared site would have been about £250. On Nov. 29, 1957, the landlord applied under s. 1 of the Act of 1938 for leave to institute proceedings against P. and the company in regard to the breach G
H
I

* The terms of s. 1 (5) of the Act of 1938 are set out in the footnote to p. 387, post.

A of repairing covenants in the lease. P. admitted that the cost of remedying breaches of covenant would amount to £2,500. Evidence showed that the property was in an insanitary condition, damp and ill-ventilated. Rent had been received by the landlord and, among other defences, it was contended on the tenant's behalf that thereby forfeiture for breach of covenant had been waived.

B **Held:** (i) leave to institute proceedings for breach of the repairing covenants in the lease would be granted because—

C (a) the landlord had established that para. (a) of s. 1 (5) of the Leasehold Property (Repairs) Act, 1938, was satisfied in that the value of the reversion had been substantially diminished by the breach of covenant, notwithstanding the existence of the clearance order and the unconfirmed order for compulsory acquisition, and

(b) the landlord had established that para. (c) of s. 1 (5) was satisfied in that the immediate remedying of the breach of covenant was required in the interests of the occupiers.

D (ii) neither the making of the order for compulsory acquisition nor the assignment of the lease to the company was, however, such a special circumstance as would render it just and equitable within para. (e) of s. 1 (5) that leave to institute proceedings should be given under that paragraph.

E (iii) the court would declare (under s. 2 of the Act of 1938) that the landlord would be entitled to such benefit from s. 146 (3) of the Law of Property Act, 1925, which related to a landlord's expenses of employing solicitors and surveyors, as might be decided by the trial judge.

[As to the effect of a counter-notice by the tenant under s. 1 of the Leasehold Property (Repairs) Act, 1938, see 23 HALSBURY'S LAWS (3rd Edn.) 588, para. 1272.

F For the Leasehold Property (Repairs) Act, 1938, s. 1 (5), see 13 HALSBURY'S STATUTES (2nd Edn.) 915; and for the Landlord and Tenant Act, 1954, s. 51 (2) (c) and (d), containing amendments to s. 1 (5) of the Act of 1938, see 34 HALSBURY'S STATUTES (2nd Edn.) 430.]

Adjourned Summons.

G By an originating summons, dated Nov. 29, 1957, Sampson Phillips (referred to hereinafter as "the applicant") applied for leave to institute proceedings under s. 1* of the Leasehold Property (Repairs) Act, 1938, for possession of property known as Garfield House, Mardyke Street, Southwark, London. The applicant was the owner in fee simple of the property which was conveyed to him by a conveyance dated Nov. 12, 1954, subject to and with the benefit of a lease, dated May 1, 1883, for a term of eighty years from Sept. 29, 1882. The respondents to the summons were Arthur Roland Price (referred to hereinafter

H * Section 1 (5) of the Leasehold Property (Repairs) Act, 1938, as amended by s. 51 (2) (c) and (d) of the Landlord and Tenant Act, 1954, reads: "Leave for the purposes of this section shall not be given unless the lessor proves—(a) that the immediate remedying of the breach in question is requisite for preventing substantial diminution in the value of his reversion, or that the value thereof has been substantially diminished by the breach; (b) that the immediate remedying of the breach is required for giving effect in relation to the premises to the purposes of any enactment, or of any byelaw or other provision having effect under an enactment, or for giving effect to any order of a court or requirement of any authority under any enactment or any such byelaw or other provision as aforesaid; (c) in a case in which the lessee is not in occupation of the whole of the premises as respects which the covenant or agreement is proposed to be enforced, that the immediate remedying of the breach is required in the interests of the occupier of those premises or of part thereof; (d) that the breach can be immediately remedied at an expense that is relatively small in comparison with the much greater expense that would probably be occasioned by postponement of the necessary work; or (e) special circumstances which in the opinion of the court, render it just and equitable that leave should be given."

as "the first respondent"), and Crosslet Properties, Ltd. (referred to hereinafter as "the second respondent"). The first respondent was the lessee of the property under the lease of 1883 from Aug. 23, 1937, until Feb. 21, 1956, on which date he assigned his leasehold interest to the second respondent. By his originating summons the applicant applied for the following relief: (i) that the applicant might be at liberty to institute proceedings against the second respondent for possession of the property and against both the respondents for damages for breach of the lessee's covenants to repair contained in the lease; (ii) that the applicant might be entitled to the benefit of s. 146 (3) of the Law of Property Act, 1925, so far as regards the costs and expenses incurred by him in reference to the said breach; and (iii) the costs of the application.

D. G. Scott for the applicant.

F. B. Alcock for the respondents.

HARMAN, J.: This is a preliminary point of law concerned with what is required of the landlord to bring himself within the scope of the Leasehold Property (Repairs) Act, 1938. The intention of the Act was to restrict the rights of landlords to enforce the covenants by the lessee in the lease—primarily, but not solely, the obligations to repair. Section 1 (1) of the Act provides that, where the usual notice is served by a landlord under s. 146 (1) of the Law of Property Act, 1925—the notice which is a pre-requisite in nearly every case to an action for forfeiture—then the lessee may serve a counter-notice that he desires to obtain the benefit of the Act of 1938. This was restricted in the original Act to a period more than five years before the end of the term, but the period was cut down in 1954 to three years.* The Act applied originally to what were called "long leases", that is to say, twenty-one years, that being apparently the legislature's view of a long lease.† That was cut down to seven years‡, so now that, if there be more than three years to run of a total term of seven years, the landlord has to get over the extremely high fences which this Act sets up before he may even start to bring an action to enforce his rights.

It is not for me to comment on the justice of that. What I am confronted with are the conditions on which leave may be granted or withheld. Section 1 (5) of the Act of 1938, in which the conditions are stated, is couched in negative terms. It does not permit the court to give leave wherever it finds certain circumstances. It says: "Leave . . . shall not be given unless . . .", and the burden of proof is put on the landlord—"unless the [landlord] proves . . ." There follow five paragraphs, (a), (b), (c), (d), (e). Between para. (d) and para. (e) there is the word "or"; paras. (a), (b), (c), (d) are merely separated by a semi-colon in each case; so that leave shall not be given unless the landlord proves (a) that a certain condition is satisfied; (b) that another condition is satisfied; (c) that the third condition is satisfied; (d) that the fourth condition is satisfied; or (e) special circumstances. In my opinion, those special circumstances are a general alternative to the rest of the sub-section.

It is said by counsel for the respondents (and said with a great deal of cogency) that paras. (a), (b), (c), (d) are not couched in any alternative form, and that it is necessary, if the landlord cannot bring himself within the "special circumstances" set out in para. (e), for him to prove the whole of paras. (a), (b), (c), (d), because there is no alternative word between them. This, I must say, is a blot on the draftsmanship. I should have thought that it was of the first necessity that the legislature should make it plain whether the paragraphs are alternative or collective. It has not done so. It has put in

* By s. 51 (1) (b) of the Landlord and Tenant Act, 1954; 34 HALSBURY'S STATUTES (2nd Edn.) 430.

† See s. 7 (1) of the Act of 1938.

‡ By s. 51 (1) (a) of the Act of 1954.

- A one alternative at the end of para. (d); that makes para. (e) either alternative to para. (d), or alternative to all the preceding paragraphs. It was also suggested, in this state of things, that as there was no "or", and as the prohibition was on the landlord "unless [he] proves" as follows, the right view was that he must prove them all, and to this view I was at one time inclined. I have, however, changed my mind because, when I look at the sub-section, I find that
- B para. (a), for instance, and para. (b) contain within themselves alternatives, and each of them, I think, is intended to provide a category in itself; that is to say, the landlord must prove either what is in para. (a), or what is in para. (b), or what is in para. (c), or what is in para. (d). The court is not bound even then to give him any relief, but it cannot give him any "unless [he] proves", whatever that may mean (and that I have not yet considered) the matters
- C stated in one at least of the paragraphs. It seems to me that the conclusive argument about the alternative view is to be found in para. (b), because there the landlord has to bring himself within statutory requirements, and it would follow that, where no statute came into the picture, a landlord could never get any leave to enforce his rights. That seems to me to be so unjust that it is an intention not to be imputed to the legislature unless I must impute
- D it. I do not think that I need, and I am not inclined to do so. Accordingly, I hold that it is enough for the landlord to bring himself within para. (a) or para. (b) or para. (c) or para. (d) or para. (e), and that, if he does so, it will then be for me to consider whether I ought to give him leave to start proceedings.

[His LORDSHIP then heard argument on the questions raised by originating summons.]

- E **HARMAN, J.:** The applicant landlord, Sampson Phillips, is the freeholder of some property known as Garfield House, Mardyke Street, Southwark, subject to a lease now vested in the second defendants, Crosslet Properties, Ltd. The lease will expire, if it runs its full course, in 1962. The landlord served the tenant with a notice under s. 146 (1) of the Law of Property Act, 1925, specifying
- F various breaches of the repairing covenant, and was met with a counter-notice under the Act of 1938. All that was done in due course, and the landlord admits that, unless he can obtain the leave of this court, he can bring no forfeiture action. The question, therefore, is whether he has surmounted the various obstacles which the Act of 1938 puts in his way.

- G The lease was made on May 1, 1883, for a term of eighty years from Michaelmas, 1882, at a rent of £26 a year. It was evidently a lease granted to the builder of this property, which is a tenement building in Southwark built, for all I know, in the typical manner of 1882, containing twelve flats, all of them still occupied. The first respondent, Arthur Roland Price, comes on the scene in 1937 when he acquired the lease, together with other neighbouring property, by virtue of an assignment dated Aug. 23, 1937. It was then, according to him, already a
- H slum property in a slum area; I take that to mean that it was not in good repair when he bought it. The present landlord does not come on the scene until Nov. 12, 1954, when he bought the reversion of this property by some kind of sub-sale on the sale by the freeholders of a large block of properties in the vicinity. He paid £275 for his reversion, which then had eight years to run. Obviously, this was a speculation. He was not concerned with anything
- I except what he could possibly make out of the butt end of this lease. He instructed well known surveyors, Messrs. Frank Swain & Co., to make a careful survey of the building, and as a result he served, on Apr. 1, 1955, a formidable schedule of dilapidations, priced at some £5,000 on the first respondent, and required him to comply with the repairing covenants in the lease. The first respondent retorted with a counter-notice on Apr. 14, 1955, under s. 1 of the Act of 1938, as was to be expected. Moreover, he was at pains on Feb. 21, 1956, to assign the butt end of the lease to the second respondent, a company of no substance, and of which members of his family are directors and he is the

secretary. He gave notice of that assignment in March, 1956, and after a considerable interval (i.e., on Oct. 15, 1956) the applicant caused another notice of dilapidations to be served on the second respondent. A counter-notice was served by the second respondent on Oct. 22, 1956. So 1956 wore away, with the second respondent presumably collecting the rents of the twelve flats (the rents being between £20 and £40 a year) and doing no substantial repairs, but keeping out of the way of sanitary notices. The position was very much changed in April, 1957, when the London County Council, exercising powers under the Housing Act, 1936, declared the area which includes Garfield House to be a clearance area. That was followed, on Nov. 20, 1957, by a compulsory purchase order which has not yet been confirmed by the Minister of Housing and Local Government, and that is the present position. The present summons was issued on Nov. 29, 1957, after the compulsory purchase order was made.

I go back now to the Leasehold Property (Repairs) Act, 1938. I have already decided that what has to be shown by the applicant is that one or other of the matters set out in s. 1 (5) of the Act is present here, and the landlord says that he is in a position to prove several of them. First, he says, as regards para. (e) of s. 1 (5), that there are special circumstances here which, in the opinion of the court, render it just and equitable that he should have leave to bring the action. The special circumstances put forward are, first, the existence of the compulsory purchase order. The effect of that, if confirmed, would be that the property will be acquired by the London County Council, who will have to pay for it the value of the site only as a cleared site, a value which appears to be somewhere in the region of £250. It is said that that state of things has been brought about by the default of the respondents, and that, therefore, it is just and equitable that the applicant should exercise his rights, because otherwise the applicant will not even be able to save out of the wreck the whole of the compensation which will become payable. The objection taken to that is that anyone buying property of this sort must contemplate the possibility of clearance orders and compulsory purchase in these days, and that is one of the risks which a speculator takes. In my judgment, that point is a good one. I do not think that the existence of the compulsory purchase order is a special circumstance within para. (e).

Then it is said that it was a special circumstance that the first respondent had assigned the lease to the second respondent, obviously with a view to avoiding liability so far as he could. It is well known that people of this sort always resort to this kind of expedient, and I do not think that that is a special circumstance at all. Whether it will do the first respondent any good, I do not stop to consider. If the only question before me was whether it was just and equitable that the action should be brought, I should say that it was, but that is not what s. 1 (5) (e) of the Act of 1938 says. I do not see any special circumstances here within the meaning of para. (e), and the applicant, therefore, must rely on para. (a), or para. (b), or para. (c), or para. (d). He does not say that he can rely on para. (d), so that leaves paras. (a), (b) and (c).

The part of para. (a) which is relied on is that the value of the reversion has been substantially diminished by the breach. Under para. (b) it is said that the breach ought to be remedied in order to satisfy the various statutory provisions and regulations in connexion with repair, maintenance or the sanitary condition of houses. Then it is said, under para. (c), that it is in the interests of the occupiers that the breach should be immediately remedied. As to para. (a), I am of opinion that the landlord proves his case. It is admitted that there have been wholesale breaches of the repairing covenants; the landlord says £5,000 worth, and even the first respondent agrees £2,500 worth. No attempt has been made to keep this property in the state in which the tenant is bound to keep it. The first respondent has simply taken his rents and done as little as he could. It seems to me clear that this property in good repair

- A must be worth more than in its present condition. It is said, however, that this is a property in which a compulsory purchase order has been made, and site value only will be paid, and that the same thing would have happened if the property had been kept in first class order throughout the term of the lease. I do not accept that at all. It seems to me ridiculous to say that it would have made no difference if the London County Council surveyors had found
- B that the property was in first class repair, even though the other properties in the road were not. In that case, two things might have happened: either this property might have been excluded from the clearance area, in which case market value would have been paid for it, or some so-called *ex gratia* payment might have been payable for it. In my view, the words "unless the lessor proves" in s. 1 (5) of the Act of 1938, cannot mean more than that the court,
- C on balance of the evidence, is persuaded—the standard of proof is that in a civil action. I prefer the evidence of Mr. Davis, the landlord's surveyor, on this part of the case to that of Mr. Stimson, the respondents' surveyor, who merely says, in a vague and completely general way:

- "I am of opinion that, even if Garfield House had been maintained in proper condition to the fullest extent required by the covenants of the lease thereof, the bad arrangement and age of the property would have rendered it just as unfit for human habitation as it is now."
- D

- The age of the property has nothing to do with it being unfit for human habitation. In s. 4 of the Housing Act, 1957, which defines what is to be looked at when considering fitness for human habitation, one does not find anything about age; nor, indeed, does one find anything about bad arrangement. Bad arrangement cannot be made a reason for making a compulsory purchase order, and declaring the property to be part of a clearance area apart from the conditions set out in s. 4 (1) of the Housing Act, 1957. The first condition set out in s. 4 (1) is "(a) repair", and I cannot think that bad arrangement is the principal matter when the property is said to be in an insanitary condition, damp, ill-ventilated,
- E and with everything wrong with it, and that because (according to the evidence of Mr. Davis) the covenants in the lease have not been observed. A mere *ex cathedra* statement on the other side that bad arrangement would have produced the same effect does not seem to me to carry much weight. These flats were built in 1882, when ideas about housing were very different from what they are today. They have no bathroom, they have no larder, but otherwise they seem to be quite adequate kind of tenements. I cannot believe that the absence of a bathroom and the absence of a ventilated larder alone are sufficient to induce local authorities in these days to declare a flat unfit for human habitation. They are undesirable features, no doubt, and not in accordance with modern practice, but they are features which exist in a vast majority of houses in this country, I venture to say. Therefore, it seems to me that the landlord
- F has succeeded in proving that which is required under para. (a) of s. 1 (5).
- G

- Whether para. (b) of s. 1 (5) is satisfied depends on a very general statement by Mr. Davis that many of the details in his schedule of dilapidations ought to be done in order to give effect to the provisions of the Public Health (London) Act, 1936, and bye-laws made thereunder. Mr. Davis does not condescend to any detail, or to anything more than a very vague statement about that, and I
- H do not think that I ought to take any notice of it, especially having regard to the fact that if there is no immediate remedying of the breach, that, no doubt, will go on year after year; and, on the evidence before me, those who have the duty of enforcing the bye-laws have not complained. Therefore, I do not think that the landlord satisfies para. (b).
- I

As to para. (c) of s. 1 (5) of the Act of 1938, again the matter depends on a statement made by Mr. Davis. He says that it would be in the interests of the occupiers that these breaches should be remedied. True again, that is only a rather vague statement, but it appears to me that the matter speaks for itself.

Quite clearly it is to the advantage of the occupiers that breaches of this sort should be remedied—matters such as leakage from water closets in a flat on one floor flowing down into the flat on the next floor, and so forth. A standard of repair far higher would clearly be in the interests of the occupiers—that is to say, of the twelve tenants of the twelve rent-restricted flats. Consequently, I think that para. (c) is satisfied. A

If that is so, then I have a discretion, but am not bound, to give the landlord leave to sue; the discretion entitles me to give him leave if I think fit. In my judgment he certainly ought to be given leave. After all, the lessee originally covenanted to do all these things, and obtained possession of the property on that footing and payment of the rack rents to himself, paying a ground rent and electing to perform his covenanted obligations. Why should the present landlord not be entitled to his covenanted rights, whatever they are? Only because the Act of 1938, passed with a view to preventing some oppression, which is not clear to me, says that certain matters must be proved to the court before such an action is begun. If they are proved, I cannot see why I should interfere further with the freedom of contract which, to some small extent, is still preserved for landlords. B C

Then it is said that there is no damage to the reversion because nobody supposes that, if the landlord receives a sum of money, he would apply it to the doing of these repairs. Of course, he will not, but under a compulsory purchase order the whole property is going to be swept away. The question at issue in an action of this sort is the damage to the reversion; and the damage to the reversion which, in my judgment, has to be proved is that there would be a substantial difference between what the London County Council may be made to pay for the property, or the site as it is, and as it ought to be. How much that may be, I have no idea, and I do not propose to interfere with the trial judge by suggesting it. Consequently, I think that it is not true to say that there is no damage to the reversion. D E

Lastly, it is said that there is a waiver of the forfeiture by acceptances of rent. That does not seem to me to have anything to do with me on this application, and I say nothing about waiver or no waiver. I do not feel that the fact that the forfeiture part of the action might fail against the second respondent is material. The landlord might, nevertheless, recover in respect of breaches from the first respondent or from the second respondent. The reversion has been damaged, *prima facie* anyhow, notwithstanding (if it be the fact) that the landlord has put himself out of his right to have a forfeiture for the continuing breaches which admittedly he has proved. Therefore, I shall leave that question to be decided in the action. I make no prophesy whether the landlord will be successful; that, I am glad to think, is nothing to do with me. As the landlord has satisfied the burden which the Act of 1938 puts on him, I do not see why he should not be free, if he chooses, to put his fortunes to the test. Consequently, I propose to make a declaration in the form of para. 1 of the summons. As to para. 2, I shall declare that the landlord shall be entitled to such benefit from s. 146 (3) of the Law of Property Act, 1925, as may be decided by the judge at the trial of the suit, that being also a requirement of the Act of 1938*. As to the costs, I shall say that the landlord, if he succeeds in the action, will get the costs of this application also. If he does not succeed in the action, he will not have to pay any costs, but he will not get any. As this application is really in the nature of an interlocutory application, that seems to me to be the right course. Therefore, the landlord's costs of this application will be his costs of the action mentioned in para. 1 of the summons. F G H I

Order accordingly.

Solicitors: *Kingsley Wood & Co.* (for the applicant); *Bonwick & Co.* (for the respondents).
[Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.]

* Under s. 2 of the Act of 1938.

A Re SEBBA (deceased). LLOYDS BANK, LTD. v. HUTSON
AND OTHERS.

[CHANCERY DIVISION (Danckwerts, J.), October 16, 17, 21, 1958.]

Estate Duty—Incidence—Canadian succession duty—Ontario succession duty—Whether cost of getting in Canadian estate.

Estate Duty—Allowance—Double taxation—South African estate duty—United States of America federal estate tax—Canadian succession duty—Ontario succession duty—Benefit of allowance.

Administration of Estates—Expenses—Dominion death duties—Incidence of duties and benefit of double taxation allowances.

C By his will dated Aug. 18, 1955, a testator who died on Sept. 29, 1955, gave a number of pecuniary and specific legacies and devised and bequeathed his residuary estate to his executor on trust for conversion, directing his executor to hold the net proceeds and his ready money on trust to pay thereout all his just debts, funeral and testamentary expenses and the legacies, and to hold the residue on trusts for his relatives. The testator's estate included shares in companies in Ontario, Canada, in South Africa and in the United States of America, none of which were specifically bequeathed. He was domiciled in England. In connexion with the testator's death, estate duty became payable in South Africa in respect of the shares in a South African company, federal estate tax became payable in the United States of America and, in Canada, Dominion succession duty and Ontario succession duty in respect of the shares in companies there forming part of the deceased's estate. Under agreements made between the countries concerned, the duties paid in South Africa, the United States of America and the Dominion of Canada were allowed by the Inland Revenue Commissioners as if the amounts were paid on account of British estate duty. No corresponding agreement relating to Ontario (Province) succession duty had been made, but the amount of that duty was allowed by the commissioners in assessing estate duty in England as a debt against the relevant property. Evidence was given that the South African duty and United States tax resembled British estate duty in character and were payable out of the residuary estate. The successor was liable for the Canadian succession duty, but the duty was payable by and recoverable from the executors, with a right for executors to deduct the amount of the duty in paying over the amount of the succession. Ontario succession duty did not constitute a personal liability on any person not resident in Canada, but any transfer of the property situated in Ontario was held up and a lien for the amount of duty was imposed until the duty was paid. It was not disputed that the South African duty and United States tax were payable out of the residuary estate. On questions as to the incidence of the duties payable abroad, and the benefit of allowances made in England in respect of them,

Held: (i) the Canadian succession duty and the Ontario succession duty ought to be regarded as part of the cost of getting in the Canadian estate and therefore fell to be paid out of the residuary estate.

Dictum of JENKINS, L.J., in *Re Goetze* ([1953] 1 All E.R. at p. 84) applied.

(ii) the allowances made against estate duty in England in respect of South African estate duty, Dominion succession duty in Canada, and federal estate tax in the United States of America enured for the benefit of the persons by whom the English estate duty in respect of the foreign assets fell to be borne, rateably according to the amounts borne respectively by them.

Dictum of JENKINS, L.J., in *Re Goetze* ([1953] 1 All E.R. at p. 83) applied.

(iii) the benefit of the allowance (as a debt) of the Ontario succession duty

ought to be received by the persons who bore the English estate duty exigible in respect of the assets situated in Ontario. A

Re Cunliffe-Owen ([1951] 2 All E.R. 220) applied.

Will—Investment clause—Direction to invest in “South African trustee securities only”—Whether investments confined to such South African securities as were trustee investments by the law of England.

A testator, who was domiciled in England, directed, by his will dated Aug. 18, 1955, his trustee “to invest the residue . . . in South African trustee securities only . . .” The testator appointed an English bank to be executor and trustee and directed that so soon as executorial duties were completed his residuary estate should be transferred to the Standard Bank of South Africa, Ltd. on the trusts of his will. The beneficiaries would be resident in South Africa. A few South African securities were authorised trustee investments under English law. In South Africa no statutory provision, corresponding to s. 1 of the Trustee Act, 1925, was in force. B C

Held: the testator’s residuary estate might be invested in such investments as were regarded as suitable for the investment of trust funds by the courts of South Africa or any province thereof. D

[As to the benefit of reliefs and allowances in relation to estate duty, see 15 HALSBURY’S LAWS (3rd Edn.) 139, para. 285; and for cases on the subject, see 21 DIGEST 130, 955-959.]

As to the incidence of testamentary expenses, and as to foreign duties not being testamentary expenses, see 16 HALSBURY’S LAWS (3rd Edn.) 355, para. 687, and p. 356, para. 689; cf., on the latter point, p. 396, letter I, post. E

For the Double Taxation Relief Orders, relating to the United States of America, Canada and South Africa, see 7 HALSBURY’S STATUTORY INSTRUMENTS (First Re-Issue) 185, 189, 193, respectively.

As to the investment of trust funds, see 33 HALSBURY’S LAWS (2nd Edn.) 235, 236, para. 418.] F

Cases referred to:

- (1) *Re Norbury, Norbury v. Fahland*, [1939] 2 All E.R. 625; [1939] Ch. 528; 108 L.J.Ch. 219; 160 L.T. 572; Digest Supp.
- (2) *Re Cunliffe-Owen, Mountain v. Comber*, [1951] 2 All E.R. 220; [1951] Ch. 964; 2nd Digest Supp.
- (3) *Re Scull, Scott v. Morris*, (1917), 87 L.J.Ch. 59; 118 L.T. 7; 21 Digest 27, 151. G
- (4) *Re Goetze, National Provincial Bank, Ltd. v. Mond*, [1953] 1 All E.R. 76; [1953] Ch. 96; 3rd Digest Supp.
- (5) *Peter v. Stirling*, (1878), 10 Ch.D. 279; 21 Digest 64, 419.
- (6) *Re Maurice, Brown v. Maurice*, (1896), 75 L.T. 415; 21 Digest 130, 956.
- (7) *Re Brewster, Butler v. Southam*, [1908] 2 Ch. 365; 77 L.J.Ch. 605; 99 L.T. 517; 21 Digest 130, 957. H
- (8) *Re Scott, Scott v. Scott*, [1914] 1 Ch. 847; 83 L.J.Ch. 694; 110 L.T. 809; *affd.*, C.A., [1915] 1 Ch. 592; 84 L.J.Ch. 366; 112 L.T. 1057; 21 Digest 130, 959.
- (9) *Re Blake*, [1955] I.R. 89.

Adjourned Summons. I

This originating summons was issued by the executor of Adolph Sebba, deceased, for the determination of questions arising in the administration of his estate and relating principally to estate duty. The questions on which the judgment is reported are: (i) whether on the true construction of the will and codicil of the testator the following duties (hereinafter called “the foreign duties”), viz., (a) succession duty of the Dominion of Canada, (b) succession duty of the Province of Ontario, (c) estate duty of the Union of South Africa, and (d) federal estate tax of the United States of America, leviable in respect of

- A movable assets of the testator situated outside Great Britain at the time of his death and not specifically bequeathed by the said will or codicil (hereinafter called "the foreign assets"), and any interest payable in respect of the foreign duties, ought to be borne, as between the several persons beneficially interested under the said will and codicil:—
- (a) out of the general residuary estate of the testator as expenses of getting
- B in the foreign assets, or
- (b) out of the respective beneficial interests of the said persons, according to the incidence of the foreign duties and interest under the respective laws imposing the same, or
- (c) in some other and what manner.
- (ii) whether on the true construction of the said will and codicil the allowances
- C obtainable under the Double Taxation Relief (Estate Duty) (Canada) Order, 1946, the Double Taxation Relief (Estate Duty) (South Africa) Order, 1947, and the Double Taxation Relief (Estate Duty) (U.S.A.) Order, 1946, by way of credit against the estate duty leviable in respect of the foreign assets under the law of Great Britain, ought respectively, as between the several persons beneficially interested under the said will and codicil:
- D (a) to enure for the benefit of the general residuary estate of the testator, or
- (b) to enure for the benefit of the persons by whom the relevant foreign duties (in respect of which such allowances were made under the said Orders) fell to be borne, rateably according to the incidence on those persons of the said foreign duties, or
- (c) to enure for the benefit of the persons by whom the said British estate duty
- E leviable in respect of the foreign assets fell to be borne (or would in the absence of the said allowances have fallen to be borne), rateably according to the incidence on those persons of the said estate duty, or
- (d) to be dealt with in some other and what manner.
- (iii) whether, on the true construction of the said will and codicil, the diminution in the amount of estate duty leviable under the law of Great Britain in respect
- F of such of the foreign assets as were at the testator's death situated in the Province of Ontario, by reason of succession duty paid in that Province being allowed as a deduction in computing the value of those assets for the purpose of the said British estate duty, ought as between the several persons beneficially interested under the said will and codicil, to be treated in the same manner as the allowances mentioned in question (ii), or in some other and what manner.
- G (iv) whether, on the true construction of the said will, the "South African trustee securities" authorised by cl. 5 thereof for the investment of the testator's residuary estate were:—
- (a) securities for the time being regarded as suitable for the investment of trust money according to the practice of the courts of the Union of South Africa or any province thereof, or
- H (b) securities of the Union of South Africa or any province thereof for the time being authorised by the law of England for the investment of trust money, or
- (c) some other and what class of securities.
- E. I. Goulding* for the plaintiff.
- L. H. L. Cohen* for the first, second and fourth defendants.
- I *T. L. Dewhurst* for the third, fifth, sixth, seventh and eighth defendants.
- P. A. Goodall* for the ninth defendant.

DANCKWERTS, J., read the following judgment: Adolph Sebba died on Sept. 29, 1955. By his will dated Aug. 18, 1955, after appointing Lloyds Bank, Ltd., executor and trustee, he gave a number of pecuniary legacies and specific legacies of certain chattels. He directed the bank to set aside from his estate securities sufficient to raise £3 a week to be paid to his late secretary, Mrs. Winifred Birtwell, for her life, and after her death he directed the bank to divide

the capital so appropriated equally between his brothers, Sam and Joe Sebba, and his sister, Sarah Lewis, or such of them as should survive the annuitant. The testator devised and bequeathed all the residue of his real and personal estate on trust for conversion, and directed the bank to hold the net proceeds of sale and conversion and his ready money on trust (a) to pay thereout all his just debts, funeral and testamentary expenses, and the legacies given by his will or any codicil thereto, and (b) to invest the residue of such moneys in "South African trustee securities only" with power to vary such investments for others of a like nature. The testator then directed the bank to hold his residuary trust fund in various fractions on trusts for his relatives, providing for life interests and interests in capital. The testator gave the bank power to postpone sale and conversion, and by cl. 8 he directed the bank so soon as all executorial duties should have been completed to transfer and vest the whole of his residuary trust fund to and in the Standard Bank of South Africa, Ltd. to hold the same on and subject to the trusts, powers and provisions hereinbefore declared of and concerning his said residuary trust fund. The testator made a codicil dated Sept. 28, 1955, by which he gave certain further pecuniary legacies and revoked one of the specific legacies in the will.

The testator did not own any land, and he left a large personal estate which included (i) shares in two companies situated in Ontario, a Province of Canada, (ii) shares in a gold mining company in South Africa, and (iii) shares in a radio corporation in the United States of America. His domicile at the date of his death was in England.

Estate duty in England was leviable on the testator's estate at the rate of fifty per cent. South African estate duty amounting to £207 9s. 11d. became payable in respect of the South African shares, and federal estate tax amounting to 102.46 United States dollars (about £36) became payable in the United States in respect of the radio corporation shares. In the case of the shares situate in Ontario, Dominion succession duty became leviable, and the amount was 3788.86 Canadian dollars for principal and 11.44 Canadian dollars for interest, equal to about £1,380 in all. Ontario succession duty also became leviable, and the amount was 15,590.47 Canadian dollars for principal plus 344.39 Canadian dollars for interest, equal to £5,810 in all. By reason of agreements made between the countries concerned, the sum paid in South Africa and the United States of America and to the Dominion of Canada are allowed by the Commissioners of Inland Revenue in England as if they were payments on account of British estate duty, and so credit is given for the amounts so paid against the sums payable for British estate duty. But there is no corresponding agreement in respect of the Province of Ontario duty, and so a similar allowance is not admissible in respect of that duty, but the amount thereof is allowed in effect as a deductible debt in assessing the property on which British estate duty is levied.

The question which I have to decide is the effect of these duties on the beneficial interests created by the will and codicil. In the case of the South African and United States duties, the rate of duty depends on the aggregate dutiable estate, and the executor is liable for the duty which is borne primarily by the residuary estate, in the absence of some contrary provision in the will.

Normally words exempting from death duties in an English will are confined to the duties imposed by British legislation and do not extend to duties imposed by the laws of other countries: see *Re Norbury, Norbury v. Fahland* (1) ([1939] 2 All E.R. 625) and *Re Cunliffe-Owen, Mountain v. Comber* (2) ([1951] 2 All E.R. 220). From the latter case it would appear that "testamentary expenses" is not an apt phrase to describe duties leviable under the laws of other countries: see also *Re Scull, Scott v. Morris* (3) ([1917], 118 L.T. 7).

There was no real dispute that the South African and United States duties resembled British estate duty in character and were payable out of the residuary estate. The position as regards the duties leviable by the Dominion of Canada and the Province of Ontario provide more difficult questions. In a desire to save

A expense the plaintiff bank did not provide expert evidence of the nature of these duties, anticipating that the defendants might wish to file such evidence. The defendants, however, have not filed any evidence, and I am left with the summary of the effect of the duties contained in the affidavit of the manager of the plaintiff bank's executor and trustee department. Fortunately, the Dominion succession duty was considered by the Court of Appeal in *Re Goetze, National Provincial Bank, Ltd. v. Mond* (4) ([1953] 1 All E.R. 76), and I have the benefit of a statement of the nature of the duty by JENKINS, L.J., as follows (*ibid.*, at p. 80):

“ From the affidavit of a Canadian lawyer filed in the present proceedings, it appears: (i) That Canadian succession duty is assessed and chargeable on all successions on death to Canadian property. (ii) That for this purpose (so far as now material) ‘ succession ’ means every disposition of property whereby any person becomes entitled to any property or the income thereof on the death of any person. (iii) That where the deceased was at the time of his death domiciled outside Canada, the duty is exigible on or in respect of the succession to all property situated in Canada. (iv) That the duty in respect of any succession under the will of a testator is assessed at rates varying with the aggregate net value of the Canadian property passing on the death and the relationship of the successor to the testator, and that there are certain exemptions one of which frees successions of less than \$1,000 from the duty. (v) That the successor is liable for the duty assessed in respect of any succession under the will of a testator, but that such duty is nevertheless payable by and recoverable from the executors to the extent of the property administered by them, with a right for executors who are required to pay the duty to deduct it in paying over the amount of the succession or to recover it from the successor personally in the event of the succession being satisfied otherwise than in money.”

I think that I am entitled to take that as a fair statement of the nature of the Dominion succession duty. As regards the succession duty imposed by the Province of Ontario, counsel have provided me with the text of the Ontario Succession Duty Act, as revised and consolidated in 1950. I find that by s. 5, subject to the exemptions contained in s. 3 and s. 4, on the death of any person whether he dies domiciled in Ontario or elsewhere, where any property situate in Ontario passes on his death duty is to be levied on such property in accordance with the dutiable value thereof. Under s. 6 the rates of duty vary according to the aggregate value of the estate and according to the relationship of the person to or for whose benefit the property passes, i.e., whether lineal relatives, collaterals, or strangers in blood. I observe that by s. 8 an allowance is to be made for estate, agency or succession duty payable in any jurisdiction designated by the Lieutenant Governor in Council. By s. 9 on the death of any person, whether he dies domiciled in Ontario or elsewhere, unless the consent in writing of the treasurer is obtained, no bank, trust company, insurance company or other corporation having its head office, principal place of business, office from which payments are made, register of transfers, or any place of transfer, in Ontario may deliver, assign, transfer or pay, or permit the delivery, assignment, transfer or payment of any property situate in Ontario in which the deceased at the time of his death had any beneficial interest, and penalties are imposed for breach of this provision.

By s. 11 every person resident in Ontario at the date of death of the deceased to whom or for whose benefit any property in Ontario passes on the death of the deceased is liable for the duty levied on the proportion of such property which so passes to him or for his benefit, together with such interest as may be payable thereon. By s. 19, where any duty is levied on property passing on the death of the deceased, such duty or so much thereof as remains unpaid, with interest thereon, is to be and remain a first lien and charge on such property until paid or a certificate is given discharging such property. It is provided by s. 24 that an

executor or trustee, as such, shall not be personally liable for any duty, but an executor, trustee or person in Ontario in whom any property passing on the death of the deceased is at any time after the death of the deceased vested, or who has the management or control thereof, shall not transfer any such property to the person beneficially entitled thereto without deducting therefrom or collecting an amount sufficient to pay the duty and interest payable by such person. There does not appear to be any personal liability for duty under the statute on any person who is not resident in Ontario. I apprehend that in the case of non-residents the security for the payment of the duty is provided by s. 9 (prohibition of transfers) and s. 19 (lien on the property), particularly as the treasurer has power under s. 31 to put a stop order by writing or telegram on any property or evidence of title which he believes is about to be removed from Ontario without provision for the duty payable.

In *Re Goetze* (4) JENKINS, L.J., refers to a suggestion that irrespective of any special direction in the will and independently of the provisions of the Double Taxation Order the Canadian succession duty might perhaps properly be regarded simply as part of the cost of getting in the Canadian estate, and as such falling on residue generally. This point appears not to have been put forward at all in *Re Cunliffe-Owen* (2), and apparently it was thought unnecessary to present an argument on it in *Re Goetze* (4). But it seems to me an attractive method of disposing of the matter, and JENKINS, L.J., discusses it in *Re Goetze* (4). He said ([1953] 1 All E.R. at p. 84):

"This is not a case of a specific gift of property situated in a foreign country and attracting duty by virtue of the laws of that country, or a gift to a legatee domiciled or resident abroad which attracts duty in the hands of the legatee under the law of his or her domicile or place of residence. It is simply a case in which property situated in Canada has passed under a general residuary devise and bequest in the English will of a testatrix domiciled and resident here, and in which this country is the appropriate forum of administration. The residue, including the Canadian estate, is given on the usual trusts for sale and conversion and payment of funeral and testamentary expenses and debts and pecuniary legacies and annuities and the United Kingdom duties thereon, and subject to these payments in trust for the respondent residuary legatee. To get in the Canadian estate and make it available for application as above, the executors had to pay the Canadian succession duty. It is true that under the law of Canada the duty in question was assessed on the beneficial interests, and according to that law would fall ultimately to be borne by the beneficiaries concerned, the extent of their beneficial interests in the Canadian estate being ascertained by treating them as provided rateably out of the net Canadian and English estates, and the rates of duty varying with the relationship of the beneficiaries to the testatrix. But it does not necessarily follow that these features of the Canadian fiscal law, involving as they do a wholly artificial apportionment of debts and benefits as between the Canadian and English estates should be imported into an English administration, and the alternative course of treating the amount of the Canadian duty simply as part of the cost of getting in the Canadian estate, without regard to the peculiarities of the local law as to mode of assessment and incidence, would certainly have the merit of simplicity.

"The possible view to which I am now calling attention is supported by *Peter v. Stirling* (5) ((1878), 10 Ch.D. 279) and *Re Maurice, Brown v. Maurice* (6) ((1896), 75 L.T. 415), and, particularly, the latter case, where an Australian duty assessed by reference to the ages of the beneficiaries was held payable out of the estate as a whole and not out of the respective interests of the beneficiaries in accordance with the amounts assessed on them in Australia. Those two cases were distinguished by SWINFEN EADY, J.,

A in *Re Brewster, Butler v. Southam* (7) ([1908] 2 Ch. 365), which was a case
of a specific devise, on trusts separate from those of the residuary estate,
of land in Melbourne, Victoria, Australia, in which it was held that the
local death duties and other costs of realising the Melbourne property fell
on that property and not on residue. *Peter v. Stirling* (5) was also distinguished by WARRINGTON, J., in *Re Scott, Scott v. Scott* (8) ([1914] 1 Ch.
B 847), where it was held that the French mutation duty on chattels situated in
France should be borne by the specific legatees thereof and not by residue,
and the decision of WARRINGTON, J., was upheld in the Court of Appeal.
But there is nothing in the judgment of SWINFEN EADY, J., in *Re Brewster* (7)
or of WARRINGTON, J., or the Court of Appeal in *Re Scott* (8) to suggest that
C *Peter v. Stirling* (5) and *Re Maurice* (6) were wrongly decided. On the
contrary, the explanation given by WARRINGTON, J., in *Re Scott* (8) ([1914]
1 Ch. 854, 855) of the ratio decidendi in *Peter v. Stirling* (5) seems to me to
bring it fairly close to the present case, and his judgment was affirmed
without qualification in the Court of Appeal. As the point has not been
argued in the present case, and if made good would lead to the same conclusion
as I have reached on other grounds, I express no opinion about
D it one way or the other, but merely refer to it lest this judgment, which is
framed in accordance with the arguments presented, should be regarded
as implicitly concluding it if raised in any future case."

The facts in the present case are similar to the situation described by JENKINS,
L.J., in *Re Goetze* (4). *Peter v. Stirling* (5) and *Re Maurice* (6), I would add, with
E respect, seem to me to support entirely the view put forward by JENKINS, L.J.
It is quite clear that in *Re Brewster* (7) SWINFEN EADY, J., did not cast any
doubt on the correctness of the decisions in those two cases. He pointed out
([1908] 2 Ch. at p. 368) that in the case before him the contest was between a
specific devise and residue, a situation which is different from that in the present
case. Similarly in *Re Scott* (8) (affirmed in the Court of Appeal ([1915] 1 Ch.
F 592)) the contest was between the specific legatee of valuable tapestries attached
to the walls of the testator's house in Paris and those interested in the residuary
estate; and the evidence of French lawyers was that in France executors were
ignored and the beneficiary was the person liable for the duty and to whom the
authorities looked for payment thereof. WARRINGTON, J., held that the French
mutation duty had to be borne by the specific legatee as it was a debt due by the
G legatee, which the executors had paid on her behalf, and, therefore, distinguishable
from the duties in *Peter v. Stirling* (5), which were part of the expenses
which had to be incurred by the executors in getting in and transmitting to this
country the Australian assets. In the present case no part of the assets in Ontario
has been specifically bequeathed. They are part of the general residuary
estate out of the whole of which the pecuniary legacies have to be paid, and the
ultimate residue of which is divisible amongst the residuary legatees in the manner
H directed by the testator.

The position in the case of the Ontario duty is really even clearer than in the
case of the duty levied by the Dominion of Canada. In the case of the Ontario
duty there appears to be no personal liability on any person who is not resident
in Ontario. The position is that any transfer of the property situate in the
Province is held up and a lien for the amount of the duty is imposed until payment
I of the duty is made to the treasurer. Consequently, the executor is faced
with the necessity of paying the duty in order to free the assets of the estate
situate in the Province and collect them for the purposes of the administration
of the estate. In the case of both the Dominion duty and the duty imposed in
the Province of Ontario, it seems to me that the duties are expenses of getting in
the testator's estate and are not expenses of getting in any asset which is the
subject of a specific bequest. A similar result was reached in respect of succession
duty payable to the Dominion and Provincial Governments of Canada in

Re Blake (9) ([1955] I.R. 89), where the English cases are discussed (see p. 108 to p. 110). In my view, all the duties mentioned in question (i) of the originating summons are payable out of the general residuary estate of the testator as expenses of getting in the assets situate in the countries concerned.

[His LORDSHIP heard argument on the question numbered (ii) at p. 395, letters C to E, ante.]

DANCKWERTS, J.: This question seems to me to be covered by the statement of JENKINS, L.J., in *Re Goetze* (4) ([1953] 1 All E.R. at p. 83), where he says:

"It was not, I think, disputed that, if there had been no special directions at all in the will concerning death duties, so that each of the pecuniary legacies and annuities had to bear its due proportion of the United Kingdom estate duty attributable to the Canadian estate [which I may interpolate is the situation in the present case], the credit against such United Kingdom estate duty secured under art. V of the Double Taxation Order by payment out of each pecuniary legacy or annuity of its due proportion of the Canadian succession duty would have enured for the benefit of the pecuniary legatee or annuitant concerned (which appears to have been the effect of the decision in the second judgment in *Re Cunliffe-Owen* (2))."

That would seem to me to apply in the present case. The allowances made under the three relevant Double Taxation Orders* enure for the benefit of the persons by whom the British estate duty leviable in respect of foreign assets falls to be borne rateably according to the incidence on those persons of the British estate duty.

[His LORDSHIP heard argument on the question numbered (iii) at p. 395, letter F, ante.]

DANCKWERTS, J.: This question deals with the amount of Ontario succession duty which is allowable by the Inland Revenue in respect of estate duty payable in England as if it were a debt deductible from the property in Ontario and that became valued for the purposes of estate duty. The question is who gets the benefit of that deduction to some extent of estate duty.

The matter seems to have been dealt with by WYNN-PARRY, J., in *Re Cunliffe-Owen* (2) ([1951] 2 All E.R. at p. 227):

"The only other duty in respect of which I heard argument was South African succession duty. The position as regards this duty is different from that as regards Canadian succession duty in that there is no double taxation relief agreement covering South African succession duty."

In the present case that is the position as regards the Ontario duty.

"Nevertheless, the Inland Revenue, by way of concession, allow the amount exigible in respect of South African succession duty to be deducted from the value of the South African personalty, i.e., they allow that duty to be treated as a debt. According to the expert evidence, South African succession duty assessed in respect of any succession is payable by the successor and if paid by the executors is recoverable by them from the successor. No part of the duty is payable ultimately out of the residuary estate. The duty is assessed at rates varying with the relationship of the successor to the testator. The question, therefore, arises how the amount of

* The allowances are in respect of (a) South African estate duty under the Double Taxation Relief (Estate Duty) (South Africa) Order, 1947 (S.R. & O. 1947 No. 314, as amended by S.I. 1955 No. 424), (b) succession duty of the Dominion of Canada under the Double Taxation Relief (Estate Duty) (Canada) Order, 1946 (S.R. & O. 1946 No. 1884) and (c) federal estate tax of the United States of America under the Double Taxation Relief (Estate Duty) (U.S.A.) Order, 1946 (S.R. & O. 1946 No. 1351).

- A South African succession duty allowed by way of the concession to which I have referred should be apportioned. In my judgment, the same reasoning should apply as in the case of the credit given in respect of Canadian succession duty. Mr. Comber will be entitled to share in the amount of such concession on a similar formula to that which I have already indicated, and the residuary legatees will be entitled to have the remainder apportioned between them according to their respective interests in the residuary estate."
- B

It seems to me that the effect of that is consistent with the principle adopted in the present case; in other words, those who have to bear the proportion of the burden of the British estate duty should also receive the benefit of the proportion of the concession made by the Commissioners of Inland Revenue.

- C [HIS LORDSHIP heard argument on the question numbered (iv) at p. 395, letters G and H, ante.]

DANCKWERTS, J.: The question which I have to decide arises from the direction contained in cl. 5 (b) of the will as respects the trust fund, viz.—

- D "To invest the residue of such moneys in South African trustee securities only with power to vary such investments for others of a like nature . . ."

It appears that there is a very limited number of South African loans and stocks which come within the range of investment allowed by the Trustee Act, 1925, which in England governs the investment of trust funds. In South Africa, however, there is no corresponding statutory provision defining in what funds trustees may invest. It is stated in an affidavit sworn on behalf of the plaintiff bank that:

- E "The plaintiff company are advised by their correspondents in the Union of South Africa that there is no statutory provision in force in that country governing the investment of trust money and that in practice, subject to the express provisions of the trust instrument and to any equitable principles affecting the particular case, the following classes of securities are regarded as suitable for such investment, namely, (i) local issues of Government and leading municipal stocks, (ii) first mortgage bonds on property in the Union, (iii) stocks of certain public utility corporations in the Union and (iv) certain landed property in the Union."
- F

- G It seems to me to be absurd to think that the testator should have intended to limit the investments by his trustees to those very limited investments in South Africa which come within the Trustee Act, 1925, particularly having regard to the fact that he has directed in cl. 8 that his residuary trust fund shall be transferred, when the administration is complete, to the Standard Bank of South Africa, Ltd. at its offices in South Africa, and having regard also to the fact the beneficiaries will reside in South Africa. Some help may be gained from the gift to the annuitant who resides in England, in which case the fund is directed to be appropriated in English investments. Accordingly, I have come to the conclusion that the wider meaning must be given to the phrase used by the testator in cl. 5 (b). That meaning must be to invest in such forms of investments as are regarded by the courts of South Africa or any province thereof as suitable for the investment of trust funds.
- H

Declarations accordingly.

Solicitors: *Woodcock, Ryland & Co.*, agents for *Preston & Redman*, Bournemouth (for the plaintiffs); *Bristows, Cooke & Carpmael* (for the first defendant); *Bentleys, Stokes & Lowless* (for the second defendant); *Theodore Goddard & Co.* (for the other defendants).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

MOUAT v. BETTS MOTORS, LTD.

[PRIVY COUNCIL (Viscount Simonds, Lord Morton of Henryton, Lord Keith of Avonholm, Lord Somervell of Harrow and Lord Denning), July 17, 21, October 20, 1958.]

Contract—Breach—Damages—Measure—Controlled maximum sale price of goods—Covenant for re-sale at maximum price less depreciation—Whether damages for breach of covenant should be assessed on the basis that covenantee might buy at enhanced price in surreptitious market.

Privy Council—New Zealand—Price control—Sale of imported motor cars—Licence for importation conditional on purchaser entering into covenant restricting re-sale—Purchase of imported car at maximum control price and re-sale at profit in breach of covenant—Validity of covenant—Measure of damages for breach of covenant—New Zealand Control of Prices Act, 1947, s. 2 (1).

In March, 1955, the appellant bought in New Zealand a new American car from the respondents, who were dealers, for £1,207, which was the maximum controlled price. The importation of American cars into New Zealand was controlled by a licensing system administered by the New Zealand Board of Trade, licences being granted to importers subject to conditions, among which was a condition that the dealer would require the purchaser to enter into a deed of covenant that the purchaser would not within a period of two years from the date of the purchase of the car sell it unless he first offered it back to the dealer at the original price less depreciation. Prices were controlled by orders made under the New Zealand Control of Prices Act, 1947, and by s. 2 (1)* of that Act "price" in relation to the sale of any goods included any valuable consideration which in effect related to the sale of any goods. Sale at a price not in conformity with the price control order was an offence. The appellant, on purchasing the new car, entered into the covenant with the respondents required by the Board of Trade. Three months later, in breach of the covenant, he sold the car for £1,700. The respondents sued him for breach of contract claiming £543 damages (viz., the difference between £1,700 and £1,157 which was the contractual re-sale price to the respondents, reached by deducting the depreciation, £50, from £1,207). The appellant contended (a) that the covenant was illegal as contravening the Act of 1947 in that, by taking the covenant, the respondents were taking a valuable consideration in addition to the maximum permitted price, and (b) that, if damages were recoverable, their amount should be £50, viz., the difference between £1,207 and £1,157 as the respondents could only charge the maximum controlled price on re-selling the car.

Held: (i) the covenant was given for the privilege of being allowed to buy the car, not as consideration for its purchase, and thus the covenant was not a valuable consideration which "in effect related to the sale" within the meaning of s. 2 (1) of the Act of 1947; therefore, the taking of the covenant did not contravene the Act of 1947 and the covenant was valid.

(ii) damages should be assessed on the basis that the respondents were entitled to go into the market, notwithstanding that it was a surreptitious market fed by breaches of covenant by those who sold their cars, and to buy a similar car at market price; the respondents, therefore, were entitled to £543 damages, computed on the footing that the price of such a car in the surreptitious market was £1,700.

British Motor Trade Assn. v. Gilbert ([1951] 2 All E.R. 641) applied.

Per CURLIAM: the importers were entitled to assume that the right hand of government knew what the left hand was doing, and, therefore, to assume

* The terms of s. 2 (1) of the Act of 1947 are printed at p. 405, letter, G, post.

- A that the Director of Price Control knew that the dealers had to exact a special covenant, and fixed the maximum price on that basis (see p. 406, letter D, post).

Appeal dismissed.

- B [As to the principle of restitutio in integrum as the basis of assessment of damages, see 11 HALSBURY'S LAWS (3rd Edn.) 233, para. 400; as to the principle that a person has no right to recover damages for the consequences of a criminal act, see *ibid.*, p. 229, para. 397.

As to the measure of damages for breach of contract for the sale of goods where there is an available market, see 29 HALSBURY'S LAWS (2nd Edn.) 194, para. 260.]

- C Cases referred to:

(1) *Williams Bros. v. Ed. T. Agius, Ltd.*, [1914] A.C. 510; 83 L.J.K.B. 715; 110 L.T. 865; 39 Digest 670, 2571.

(2) *British Motor Trade Assn. v. Gilbert*, [1951] 2 All E.R. 641; 2nd Digest Supp.

Appeal.

- D Appeal by John Neil Mouat from a judgment of the Court of Appeal of New Zealand (GRESSION and MCGREGOR, JJ., F. B. ADAMS, J., dissenting), dated Mar. 8, 1957, dismissing an appeal from a judgment of the Supreme Court of New Zealand (BARROWCLOUGH, C.J.), dated June 26, 1956, awarding the respondent, Betts Motors, Ltd., £543 damages for breach of contract in an action brought by them against the appellant. The facts are set out in the judgment of the Board.

- E *R. B. Cooke* (of the New Zealand Bar) for the appellant.
J. G. Le Quesne for the respondents.

LORD DENNING: In this case, Betts Motors, Ltd., sued John Neil Mouat in the Supreme Court of New Zealand for damages for breach of contract. At the trial, BARROWCLOUGH, C.J., gave judgment for the plaintiffs for £543 and costs. The defendant appealed to the Court of Appeal of New Zealand who, by a majority (GRESSION and MCGREGOR, JJ., with F. B. ADAMS, J., dissenting), dismissed the appeal. The defendant appeals to Her Majesty in Council.

- G In 1954 and 1955, the motor car trade in New Zealand was faced with a problem. There was a big demand for new motor cars from North America, but there were not enough dollars available to pay for them all. So the number imported had to be strictly limited. The problem was how to ensure that this limited number was fairly distributed. To secure this, the Board of Trade introduced a licensing system under which no person could get one of these new cars unless he could show a special case for it. He might, for instance, be a doctor who needed it for his work. But it is obvious that, unless there were safeguards, such a system would be open to abuse. A person might put forward a plausible case for a new car and so get it from an authorised dealer at the list price; but then soon afterwards resell it at a much higher price to someone else, thus making an undeserved profit. In order to protect the trade and the public from such abuses, the dealers in New Zealand used to require the purchaser of a new car to enter into a special covenant not to resell the car within two years unless he first offered it back to the dealer at the original price less depreciation. The present case concerns one of these special covenants.

- I On Mar. 7, 1955, the appellant, Mr. John Neil Mouat, a farmer, bought a new 1954 Chevrolet motor car for £1,207. He bought it from dealers called Betts Motors, Ltd., the respondents, and at the same time he entered into a special covenant with them in these terms:

"1. The covenantor will not (except by will) during the space of two years after the delivery of the said vehicle to the covenantor deal with the said

vehicle in any manner whereby any other person or corporation may become entitled to the possession or use of the said vehicle other than for the private purposes of the covenantor or for the purpose of carrying on any profession trade or business of the covenantor or whereby the property in the said vehicle (or any charge thereon) is or may be or become liable to be transferred to or vested in any other person or corporation or whereby any mortgage or charge thereon is conferred upon any other person or corporation without first making an offer to the dealer (irrevocable for fourteen days) to resell the said vehicle to the dealer at the original sale price thereof set out in the schedule hereto less an allowance by way of depreciation calculated at the rate of ten pounds (£10) for every complete one thousand miles run by the said vehicle since the date of delivery to the covenantor but so that such allowance shall not be less than fifty pounds (£50) or more than one hundred and fifty pounds (£150) and at the time of making such offer delivering the said vehicle and leaving it for examination for a reasonable time with the dealer.

"2. The covenantor will for every breach of his agreement with the dealer hereinbefore contained pay to the dealer as and by way of liquidated damages and not as a penalty (but without prejudice to any other rights and remedies of the dealer hereunder) the sum of one thousand pounds (£1,000)."

The price paid by the appellant was £1,207; but in breach of the covenant the appellant, three months later, sold the car for £1,700. The respondents thereupon sued him for damages for breach of covenant. They admitted that they could not recover the £1,000 because it was a penalty, but they sought to recover damages assessed on the following basis: the appellant instead of selling the car for £1,700, ought to have offered to resell it to the respondents for £1,157 (being £1,207 less £50 depreciation); and they claimed £543 (being the £1,700 he got less the £1,157 at which he ought to have offered it to them). The appellant pleaded that the covenant was illegal and unenforceable. Alternatively, he said that the damages recoverable were not £543 but only £50.

Their Lordships propose first to consider the legality of this covenant. It is said to be illegal because it offended against the statute which controlled prices. The controlled price of this car was £1,207 which was the maximum which could be charged for it; and it is said that, by taking the special covenant, the respondents were taking a valuable consideration in addition to the price. The respondents replied that they were compelled to take the covenant. The Board of Trade only allowed the car to be imported on condition that the respondents insisted on such a covenant. These contentions make it necessary for their Lordships to set out the two forms of control exercised over cars at this time by the authorities in New Zealand. The one control was exercised by the Board of Trade under the authority of s. 46 of the Customs Act, 1913, as amended by s. 8 of the Customs Act Amendment Act, 1939, and s. 3 of the Customs Act Amendment Act, 1953. Under those sections, no cars could be imported without licence, and the Board of Trade could grant licences subject to conditions. The import licence in this case was given by authority of June 4, 1954, to General Motors, Ltd. They were allowed to import cars from Canada and the U.S.A. subject to a series of conditions which included, in particular, these two:

"9. In order to assist in ensuring distribution for essential needs, each dealer will require the purchaser to sign a deed of covenant or an agreement that in consideration of the payment of, say 1s. by the dealer the purchaser will not within a period of two years from the date of purchase of the new car sell or transfer or otherwise dispose of the car except to resell it to the dealer at the price which the car has been sold, less depreciation at a fixed rate.

- A "10. Upon a purchase by a dealer under the preceding paragraph, the dealer will not resell the car at a price exceeding the price at which the car was sold new, plus any necessary reconditioning cost charged at ordinary rates . . . On any resale, the dealer will require the purchaser to enter into a deed of covenant or agreement of the kind set out in the preceding paragraph to cover the unexpired balance of the original period of two years."

B Under the Customs Act, it was provided that, if any person committed any breach of the conditions or was knowingly concerned in any such breach, he was liable to a penalty of £200 or the value of the goods. In view of those conditions it is plain that the respondents had no option but to insist on the appellant signing a covenant as a condition of getting the car.

C The other control was exercised by the price tribunal set up under the Control of Prices Act, 1947. Under s. 15 and s. 16 of that Act, the tribunal were empowered to make price orders fixing the maximum prices that could be charged for goods or to give special approval to a selling price in respect of the sale of any goods. The maximum price in this case was fixed by a special approval contained in a direction which the Director of Price Control issued by a letter to General Motors, Ltd., in these terms:

" 1954 and 1955 Chevrolet Sedans

E "In pursuance of a recent decision by the price tribunal regarding maximum prices for motor cars imported completely knocked down from North America, Dominion wide maximum retail selling prices are now approved for Chevrolet Sedans as follows:

1954	..	£1,207 each
1955	..	£1,238 each."

F It was agreed by counsel that that direction must, for present purposes, be taken to have been in force on Mar. 7, 1955, before the respondents made the sale to the appellant. The question is whether it was legitimate for the respondents, in the face of that direction, not only to charge £1,207 for the car, but also to take the special covenant. This depends on the true application to this case of the following provisions of the Control of Prices Act, 1947:

G "2 (1). 'Price', in relation to the sale of any goods or to the performance of any services, includes every valuable consideration whatsoever, whether direct or indirect; and includes any consideration which in effect relates to the sale of any goods or to the performance of any services, although ostensibly relating to any other matter or thing.

H "29 (1). While a price order or a special approval in respect of any goods remains in force every person who, whether as principal or agent, and whether by himself or his agent, sells or agrees or offers to sell any goods to which the order or approval relates for a price that is not in conformity with the order or approval commits an offence against this Act."

I In applying those sections to the present case, the first question is: What was the "price" charged for this Chevrolet car? Was it £1,207 alone, or was it £1,207 plus the special covenant? Their Lordships are of opinion that, under the statutory definition, the only kind of valuable consideration which comes within the "price" is a valuable consideration "which in effect relates to the sale". The special covenant in this case was, in a sense, valuable consideration—just as any collateral contract is consideration for the making of a main contract—but it did not relate to the sale. It is of the essence of a sale that the property in the goods should be transferred from the seller to the buyer; and a valuable consideration only relates to the sale if it is given as the inducement—or one of the inducements—for the transfer of the property. In this case, the sole and entire inducement for the transfer was the cash sum of £1,207. The special covenant was not given for the property but for something different.

It was given for the privilege of being allowed to buy a new car. It was not expected to yield any benefit to the seller. Its purpose was to stop the purchaser taking advantage of his privileged position contrary to the interests of the trade and the public. It was a pre-requisite to the transfer of the property and not part of the consideration for it. In these circumstances, their Lordships think it cannot properly be said to form part of the "price" within the statutory definition. A B

Even if the "price" did include the special covenant, their Lordships think that there was no illegality. The only document fixing the maximum price of £1,207 was contained in a letter from the Director of Price Control to the importers, General Motors, Ltd. Their Lordships agree with MCGREGOR, J., in thinking that, when the Director of Price Control sent this letter, he must be presumed to have been aware of the conditions imposed by the Board of Trade—which required the dealers to exact this special covenant. It would be a strange thing if one government department—the Director of Price Control—was unaware of what another government department—the Board of Trade—was doing in relation to the self-same cars. The Board of Trade, on June 4, 1954, gave the import licence and imposed the conditions. The price control in 1955 fixed the maximum price of £1,207. Each was contained in a letter to the self-same importers, General Motors, Ltd. The importers who received those letters were entitled to assume that the right hand of government knew what the left hand was doing, and, therefore, to assume that the Director of Price Control knew that dealers had to exact a special covenant, and fixed the maximum price on that basis. In other words, the letter fixing the maximum price must be read as if there was added to it the words: "It is understood, of course, that in selling at this price the dealers will be exacting a special covenant as required by the Board of Trade conditions". So read, it is clear that the price charged by the dealer, even if it is to be regarded as including a special covenant, was in conformity with the price fixed by the price control. C D E

It was pointed out that this special covenant is somewhat different in its terms from that required by the Board of Trade conditions; but the differences are not so substantial as to affect the matter. The £1,207 plus this special covenant was still in conformity with the price direction. F

Their Lordships are of opinion, therefore, that this special covenant was not illegal, and they turn to the question of damages. It is said that the damages suffered by the dealers only amounted to £50. If the appellant had performed his covenant and offered to resell the car to the respondents for £1,157 (£1,207 less £50 depreciation) the respondents, under the Board of Trade conditions (which their Lordships have set out), could only have resold it for £1,207. So their loss, it is argued, is only £50. The result of this argument, if right, is that the appellant would benefit to the extent of nearly £500 by breaking his covenant. He made a profit on resale of £543 (£1,700 less £1,157) and would only have to pay £50 damages. In the opinion of their Lordships, the argument is not well-founded. It does not lie in the appellant's mouth to say that, if he had fulfilled his covenant, the respondents could only resell the car for £1,207. That was a matter peculiar to the respondents which was no concern of his. The respondents were entitled in law to be put into as good a position as if he had fulfilled his covenant; and to do this they were entitled to go into the market and buy a similar car at the market price: see *Williams Bros. v. Ed. T. Agius, Ltd.* (1) ([1914] A.C. 510 at p. 531, per LORD MOULTON). This rule applies even though the only available market is a surreptitious market which is fed by persons who have broken their covenants: see *British Motor Trade Assocn. v. Gilbert* (2) ([1951] 2 All E.R. 641). The market price of this car in that market was £1,700. At any rate, the appellant can hardly deny that that was its market price, since that is the sum for which he sold it; and the damages should be the difference between that market price of £1,700 and the contract price of £1,157. G H I

- A Their Lordships find themselves, therefore, in agreement with the decision of BARROWCLOUGH, C.J., and the majority of the Court of Appeal in New Zealand, and will humbly advise Her Majesty that the appeal should be dismissed. The appellant must pay the costs.

Appeal dismissed.

- B Solicitors: *Rose, Johnson & Hicks* (for the appellant); *Wray, Smith & Co.* (for the respondents).

[*Reported by G. A. KIDNER, Esq., Barrister-at-Law.*]

C

RAYMOND v. COOK.

[QUEEN'S BENCH DIVISION (Lord Parker, C.J., Streatfeild and Diplock, J.J.), October 22, 1958.]

- D *Bye-law—Construction—Noise—Using a noisy instrument so as to cause annoyance to inhabitants of neighbourhood—Ice-cream van fitted with electrical musical box with electrical amplifier—Whether evidence that annoyance was caused to particular individuals necessary.*

- E The appellant sold ice cream from a van on which there was an electrical musical box with an electrical amplifier whose volume could be adjusted by the van driver. A local bye-law provided that no person should for the purpose of selling any article shout or use any bell or other noisy instrument in any street or public place "so as to cause annoyance to the inhabitants" of the neighbourhood. The appellant was charged with two offences against the bye-law. A number of witnesses was called at the hearing but only two, one in respect of each of the two occasions that were the subject of the charges, testified that annoyance had in fact been caused to them by the use of the instrument on that occasion. The justices were of opinion that the instrument was a noisy instrument within the bye-law and that on each occasion the instrument was likely to cause annoyance to the inhabitants of the neighbourhood, and they convicted the appellant. He appealed on the ground, *inter alia*, that there had not been at least two witnesses (the words "inhabitants" in the bye-law being in the plural) on each charge who had testified that they were in fact annoyed by the instrument.

- G **Held:** where, as in the present case, the words of the bye-law on their true construction prohibited, in substance, the use of a noisy instrument that was so noisy as to be calculated to cause annoyance, it was unnecessary, once the justices were satisfied that the instrument was likely to cause annoyance, that there should be any evidence whether one or more people were in fact annoyed by it; the appeal would, therefore, be dismissed.

[As to nuisance by noise, see 24 HALSBURY'S LAWS (2nd Edn.) 51, para. 88; and for cases on the subject, see 36 DIGEST (Repl.) 261, 109-115.]

- I Cases referred to:

- (1) *John v. Heath*, (Apr. 23, 1958), "The Times," Apr. 24.
- (2) *Booth v. Howell*, (1889), 53 J.P. 678; 38 Digest 159, 64.
- (3) *Innes v. Newman*, [1894] 2 Q.B. 292; 63 L.J.M.C. 198; 70 L.T. 689; 58 J.P. 543; 38 Digest 166, 118.

Case Stated.

This was a Case Stated by justices for the county of Hampshire in the exercise of their jurisdiction as a magistrates' court sitting at Havant on Apr. 22, 1958. Informations were preferred by the respondent, H. B. Cook, under the County

of Southampton Good Rule and Government Bye-laws (made July 26, 1926), A
No. 8*, against the appellant, Ronald John Raymond, that on Mar. 6, 1958,
at Horsebridge Road and in Crossland Drive, Westleigh, Havant, for the purpose
of selling he used a noisy instrument so as to cause annoyance to the inhabitants
of the neighbourhood.

The following facts were found. At about 12.35 p.m. on Mar. 6, 1958, Mr.
Douglas Reginald Rock, a night worker, of 28 Horsebridge Road, Westleigh, B
Havant, was disturbed by a persistent loud noise like a set of bells amplified
from a gramophone record. He was in bed trying to sleep. He looked out of
the window and saw that the noise appeared to come from an ice cream van
standing about three doors down the road. The series of notes were sounded
at intervals, and he heard them seven or eight times, including that outside his
house. This disturbance had occurred on other days and on one occasion C
(not on Mar. 6) he had complained to the driver but found him unco-operative.
At about 11.50 a.m. on the same day, Mr. John James Bowden, also a night
worker, who lived at 1, Crossland Drive, Westleigh, was asleep and he was
awakened by musical bells. He also looked out of the window and saw that the
noise appeared to come from an ice cream van next door. It moved off after
five minutes. He did not complain to the driver as it was part of the ice cream D
owners' trade to ring the bells, although there was a prominent notice on the
van asking people to make complaints if they were disturbed. He had never
asked his wife to go and speak to the driver for him. He went to the police
as "he had taken just about enough of it". On Mar. 9, 1958, the appellant
was interviewed by P.C. Pearce, who told him of the complaints that had been E
made, and the appellant admitted that he had been using the ice cream van on
the two occasions in question. He also said that, if the aggrieved persons had
complained in accordance with a notice on the van, he would have co-operated
with them. The police officer had himself heard the amplified bells on a number
of occasions. They were produced by an electrical musical box playing a tune
(which the witness recognised but could not name) with an amplifier whose
volume could be adjusted by the van driver. The van was one of a number F
belonging to Toni's Cream Ices (Portsmouth), Ltd., who hired them out to
salesmen selling Toni's ice cream on their own account. The type of musical box
and amplifier used on this van was selected after tests to determine which
noise was least annoying. The vans had been operating in the area for three
years and the company had received no complaints about the musical boxes. G
It had received at least five or six complaints from residents that they could
not hear the van. Five residents living close to Mr. Rock and Mr. Bowden
were called on behalf of the appellant. They all said that the musical instrument
on this van had never annoyed them or their families. Three of these witnesses
had young children none of whom had been awakened when asleep by the bells
from the van. One of the witnesses sometimes failed to hear them at all when
he had his wireless on, which he did not have on too loudly because of his H
children. Another of the witnesses was sometimes on night work, but he had
never been wakened by the van when sleeping during the day. These witnesses
welcomed the sound from the bells because it indicated to them that the ice
cream van was outside, and for this reason they would have minded if it stopped.
They were all customers of the van. In the summer the appellant sold about
sixty thousand ice creams per week on this round, which he did twice a day. I
He had only two complaints about the bells but at least ten times as many
that they were not loud enough.

It was contended by the appellant that, on a proper construction of the

* "No person shall for the purpose of hawking, selling, distributing, or advertising any article, shout or use any bell, gong, or other noisy instrument in any street or public place so as to cause annoyance to the inhabitants of the neighbourhood, or to persons assembled in any place of public worship, or public entertainment, or other place of public assembly."

- A relevant bye-laws, the musical box in question was not a "noisy instrument" within the scope of the bye-laws. On a proper construction of the relevant bye-laws, it was not enough in order to obtain a conviction merely to prove that one (possibly entirely unreasonable) resident had been annoyed; the prosecution must go further and show in respect of each alleged offence that the inhabitants generally of the neighbourhood, or alternatively that at least two of such inhabitants, had been reasonably annoyed. It was contended by the respondent that the instrument was a noisy instrument within the bye-laws and proof that one inhabitant was annoyed on each occasion was sufficient.
- B

- The justices were of opinion that the instrument was a noisy instrument within the words of the bye-law, and that its use by the appellant in a street on each of the occasions in question was likely to cause annoyance to the inhabitants of the neighbourhood, and had in fact caused annoyance to Mr. Rock and Mr. Bowden (whom they found to be reasonable persons). Being further of the opinion that it was not necessary, in order to prove a breach of the bye-law, to call evidence that on each occasion either the inhabitants generally had been annoyed or that more than one of the inhabitants had been annoyed, they convicted the appellant and fined him £1 on each charge.

- D *J. D. May* for the appellant.
D. A. Grant for the respondent.

LORD PARKER, C.J., stated the facts and continued: This bye-law, No. 8, is one of many similar bye-laws which have come before this court. It reads as follows:

- E "No person shall for the purpose of hawking, selling, distributing, or advertising any article, shout or use any bell, gong, or other noisy instrument in any street or public place so as to cause annoyance to the inhabitants of the neighbourhood . . ."

- Counsel for the appellant in his careful argument has taken two points. First, he says that, if one looks at other of these bye-laws, one will see that reference is made not only to noisy instruments but to musical instruments, and, accordingly, he says that in this bye-law, a noisy instrument, which is alone referred to, is to be contrasted with musical instruments and that this instrument used on this van was a musical instrument. In other words, provided it is a musical instrument, so counsel argues, it matters not how noisy it is and what disturbance is caused. For my part I entirely reject that argument. An instrument may be a noisy instrument whether or not it is a musical instrument.
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- Secondly, he says that on the wording of this bye-law no case is made out unless the prosecution prove that at least two of the inhabitants, because the word is used in the plural, have in fact been annoyed. It is undoubtedly true that in this case only one witness was called in regard to each offence to say that he was annoyed. The wording no doubt varies in these bye-laws. Sometimes it is, as here, "shout or use any . . . noisy instrument . . . so as to cause annoyance", and sometimes it is "shout or use a noisy instrument to the annoyance". It has been held by this court only this week* that, if the words are "shout to the annoyance", the sole question is whether the shouting was such as was calculated to annoy, and, if that be the question, then the justices might be satisfied that the offence was made out even though no evidence was called that any particular person was annoyed. They may from the rest of the evidence and the evidence of the police constable be satisfied that the noise in question was noise calculated to be an annoyance, but the words, as counsel has pointed out, are "use any . . . noisy instrument . . . so as to cause annoyance". For my part, I read those words in the same sense and as meaning a noisy instrument such as was calculated to cause annoyance. Indeed, in a case heard earlier this year, *John v. Heath* (1) ((1958), "The Times", Apr. 24),
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* In *Griffin v. Haywood*, Oct. 21, 1958 (unreported).

which also concerned the sale of ice cream, this court held that the words really meant "so as to cause annoyance, as were calculated to cause annoyance", and further held that it would be unnecessary in certain cases to call any evidence that any particular people were annoyed. The proper approach to these cases is for the justices to ask themselves first: Was the noisy instrument so noisy as to be calculated to annoy? On that, the facts may speak for themselves, or it may be necessary for them to hear evidence, albeit of only one person; but once they have come to the conclusion that the noise was calculated to annoy, then it is quite unnecessary for them to have any evidence as to who and how many people were in fact annoyed. In the present case the evidence was both ways, but, having heard all the evidence, the justices were satisfied that this instrument was likely to cause, to use their words, annoyance to the inhabitants and, having got to that stage, it seems quite unnecessary to have had evidence that any or even more than one inhabitant was in fact annoyed. The justices approached the matter in a perfectly correct way, and I would dismiss this appeal.

I ought to add that in this case the court has had drawn to its attention and has considered *Booth v. Howell* (2) ((1889), 53 J.P. 678) and also *Innes v. Newman* (3) ([1894] 2 Q.B. 292).

STREATFEILD, J.: I agree and have nothing to add.

DIPLOCK, J.: I also agree.

Appeal dismissed.

Solicitors: *John W. Emmerson*, Edgware (for the appellant); *Theodore Goddard & Co.*, agents for *G. A. Wheatley*, Winchester (for the respondent).

[*Reported by G. A. KIDNER, ESQ., Barrister-at-Law.*]

JONES v. JONES.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P., and Hewson, J.), October 15, 1958.]

Magistrates—Husband and wife—Maintenance—Wilful neglect to maintain—Punctual payments by husband under order made under National Assistance Act, 1948—No proof that change in wife's circumstances known to husband—Whether wilful neglect on his part to provide reasonable maintenance established—National Assistance Act, 1948 (11 & 12 Geo. 6 c. 29), s. 43—Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 Vict. c. 39), s. 4.

The wife was in receipt of assistance under the National Assistance Act, 1948, and on Oct. 6, 1953, a magistrates' court made an order under s. 43 of that Act that the husband should pay to the wife £2 17s. 6d. per week. This sum was punctually and regularly paid to the wife. In May, 1958, the wife complained to the same magistrates' court under the Summary Jurisdiction (Married Women) Act, 1895, s. 4, alleging that the husband had been guilty of wilful neglect to provide reasonable maintenance for her. It was not proved that the husband knew, before the date of the complaint, that the sum of £2 17s. 6d. a week was not sufficient for her needs or of any change in her circumstances. On June 3, 1958, the magistrates' court found the wife's complaint proved on evidence that the wife was suffering hardship and that the husband, being maintained in hospital, could afford to pay, and ordered the husband to pay the wife £2 a week.

Held: the order of June 3, 1958, would be set aside since the husband, who had punctually paid under the order of Oct. 6, 1953, and who was ignorant of any change in the wife's circumstances, could not be held guilty of "wilful neglect to provide reasonable maintenance for her", a phrase which implied an element of misconduct.

A Observations of DENNING, L.J., in *National Assistance Board v. Parkes* ([1955] 3 All E.R. at p. 4) applied.

Per LORD MERRIMAN, P.: I am prepared to assume that the principle in *Morton v. Morton* ([1942] 1 All E.R. 273 at pp. 274-276) and *Tulip v. Tulip* ([1951] 2 All E.R. 91), namely, that punctual payment of maintenance under an agreement is not conclusive against an allegation of wilful neglect to provide reasonable maintenance, applies to punctual payments under the order of Oct. 6, 1953 (see p. 412, letter G, post).
Appeal allowed.

[As to the phrase "wilful neglect to provide reasonable maintenance", see 12 HALSBURY'S LAWS (3rd Edn.) 482, para. 1077, text and note (h); and for cases on the subject, see 27 DIGEST (Repl.) 701, 6707 and SUPPLEMENT.

C For the National Assistance Act, 1948, s. 42, s. 43, see 16 HALSBURY'S STATUTES (2nd Edn.) 968, 969.

For the Summary Jurisdiction (Married Women) Act, 1895, s. 4, see 11 HALSBURY'S STATUTES (2nd Edn.) 849.]

Cases referred to:

- D (1) *Birmingham Union v. Timmins*, [1918] 2 K.B. 189; 87 L.J.K.B. 1096; 119 L.T. 146; 82 J.P. 279; 37 Digest 234, 261.
(2) *Starkie v. Starkie*, [1953] 2 All E.R. 1255 n; 118 J.P. 17 n; 3rd Digest Supp.; *Starkie v. Starkie* (No. 2), [1953] 2 All E.R. 1519; 118 J.P. 59; 3rd Digest Supp.
(3) *Morton v. Morton*, [1942] 1 All E.R. 273; 111 L.J.P. 33; 166 L.T. 164; 106 J.P. 139; 27 Digest (Repl.) 706, 6750.
E (4) *Tulip v. Tulip*, [1951] 2 All E.R. 91; [1951] P. 378; 27 Digest (Repl.) 85, 635.
(5) *National Assistance Board v. Parkes*, [1955] 3 All E.R. 1; [1955] 2 Q.B. 507; 3rd Digest Supp.
(6) *Baker v. Baker*, (1949), 66 (pt. 1) T.L.R. 81; 27 Digest (Repl.) 82, 630.
F (7) *Chapman v. Chapman*, (Apr. 4, 1951), Unreported.
(8) *Pinnick v. Pinnick*, [1957] 1 All E.R. 873; 121 J.P. 256; 3rd Digest Supp.
(9) *Stringer v. Stringer*, [1952] 1 All E.R. 373; [1952] P. 171; 116 J.P. 102; 3rd Digest Supp.
(10) *Whittaker v. Whittaker*, [1939] 3 All E.R. 833; 27 Digest (Repl.) 713, 6805.
(11) *Diggins v. Diggins*, [1927] P. 88; 96 L.J.P. 14; 136 L.T. 224; 90 J.P. 208; 27 Digest (Repl.) 714, 6809.
G (12) *Jones v. Jones*, (1929), 142 L.T. 168; 94 J.P. 31; 27 Digest (Repl.) 701, 6707.

Appeal.

The husband appealed against an order of the Welshpool justices dated June 3, 1948.

H The husband was permanently disabled one hundred per cent. as a result of war service and was permanently confined to a hospital under the control of the Ministry of Pensions. The wife received assistance from the National Assistance Board under the National Assistance Act, 1948. On Oct. 6, 1953, on a complaint made under s. 43 of the Act of 1948, the justices made an order that the husband should pay to the wife the sum of £2 17s. 6d. This sum was regularly deducted from the pension payable to the husband by the Ministry of Pensions and paid punctually to the wife. On May 2, 1958, the wife complained to the justices that the husband had wilfully neglected to provide reasonable maintenance for her. The complaint was heard on June 3, 1958, when the justices found the complaint proved and made an order under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, that the husband pay to the wife the sum of £2 a week. The husband appealed.

J. Perrett for the husband.

D. R. Stuckey (G. H. Crispin with him) for the wife.

LORD MERRIMAN, P., stated the facts and continued: It was suggested A
in the court below that the magistrates had no jurisdiction to make an order
under the Summary Jurisdiction (Married Women) Act, 1895, because of the
existence of the order of Oct. 6, 1953. I do not propose to dilate on this point,
because it has been abandoned here before us. I merely say this, that there is
authority in *Birmingham Union v. Timmins* (1) ([1918] 2 K.B. 189) which decides B
that the existence of an order under the Act of 1895 did not prevent the guar-
dians from getting an order under the law which prevailed in 1918*, corresponding
in some respects, but not in all, to the law laid down in the National Assistance
Act, 1948. If the point had not been abandoned I should have wished to go
into the converse position rather more carefully than we have been able to do on
a cursory examination of *Birmingham Union v. Timmins* (1).

That brings me to the real point in the present case. It is suggested that the C
magistrates ought not to have found wilful neglect to maintain because of the
punctual payment under the order made on Oct. 6, 1953. I think myself that
that is not a good point, but I should have been happier about it if I felt that the
magistrates had ever really given their attention to the issues which arise out
of the circumstances that this order existed and had been punctually paid. They
say in their reasons that they have come to the conclusion that wilful neglect D
to provide reasonable maintenance was proved because the evidence showed
wilful neglect to provide reasonable maintenance and showed that the com-
plainant was suffering extreme hardship; they said:

"the evidence shows that though the husband is unfortunately com-
pletely disabled he is possessed of sufficient means to maintain the wife . . . E
[and] that the weight of the evidence shows that the husband being fully
maintained in hospital without any expense to himself would not suffer any
hardship in making the payments ordered."

I confess that those reasons look to me very much like saying that the wife
needed the money, that the husband had got it, and that therefore there was
wilful neglect to maintain; that there was wilful neglect to maintain because F
he had wilfully neglected to maintain her—a state of things about which we
spoke rather plainly in *Starkie v. Starkie* (2) ([1953] 2 All E.R. 1255 at p. 1256).
The real trouble in this case, in my opinion, is that that really represents what
has happened, and the crucial point has not been considered.

On the authority of *Morton v. Morton* (3) ([1942] 1 All E.R. 273 at pp. 274-6),
which has been followed and approved in *Tulip v. Tulip* (4) ([1951] 2 All E.R. 91) G
dealing with the punctual payment of maintenance under an agreement not
being conclusive against an allegation of wilful neglect to provide reasonable
maintenance, I am prepared to assume that the same principle applies to the
punctual payments under the order of Oct. 6, 1953, although there is, of course,
an essential difference between payment under an order of the court and that
which is merely payable under some agreement. I think, however, that the same H
problem still remains, whether the payment thus made is reasonable; and that
leads me to what, I think, is the essential part of the evidence which is lacking
in this case.

It is well settled that punctual payment under an agreement (and I think
that the same thing applies to punctual payment under an order) is of very
strong evidential value that the amount so agreed or so ordered is a reasonable I
amount, but it is not conclusive. Circumstances may have changed, and it is
with regard to a case in which circumstances have changed that what was said
by DENNING, L.J., in *National Assistance Board v. Parkes* (5) ([1955] 3 All E.R. 1
at p. 4) is so important. He says there:

"The principle of *Tulip v. Tulip* (4) applies, I think, just as much when
there is an agreement to pay nothing as when a fixed sum is to be paid,

* See Poor Law Amendment Act, 1868, s. 33.

- A and it overrides anything said previously in *Baker v. Baker* (6) ((1949), 66 (pt. 1) T.L.R. 81) and *Chapman v. Chapman* (7) ((Apr. 4, 1951), unreported)."

Pausing there, I ought to say that at this moment my brother and I have reserved a judgment* dealing with the validity of that pronouncement, about which, if I may quote myself and COLLINGWOOD, J., this court has already said something

B in *Pinnick v. Pinnick* (8) ([1957] 1 All E.R. 873). We are not concerned here with that part of the case. What is important are the words that follow. DENNING, L.J., went on ([1955] 3 All E.R. at p. 4):

- C "So long as the husband is ignorant of the new situation he is under no such duty [to maintain her], and is not guilty of wilful neglect to maintain her. That is, I think, the effect of the decision in *Stringer v. Stringer* (9) ([1952] 1 All E.R. 373)."

Stringer v. Stringer (9) is one of the cases in which the decision of the Court of Appeal in *Chapman v. Chapman* (7) was followed, and it happens to contain the explanation of how the unreported case of *Chapman* (7) came to be decided.

- D It is perfectly correct to say it is a case in which the husband had had it brought to his notice that the circumstances had changed since the original situation. But we have looked in vain in the present case for any evidence whatever that at any time the financial plight of the wife, of which details were given to the magistrates, had ever in any way, directly or indirectly, been brought to the notice of the husband. After all, it was for the wife to prove her case of wilful
- E neglect to provide reasonable maintenance. In the absence of proof of the important facts that her situation had changed for the worse, that the money which was being provided for her under the order of Oct. 6, 1953, was not sufficient to meet her needs, and that this was brought home to the knowledge of the husband, in my opinion, on the authority of the passage that I have just read, the wife fails. Likewise on the line of authorities *Starkie v. Starkie* (No. 2) (2)
- F ([1953] 2 All E.R. 1519), *Whittaker v. Whittaker* (10) ([1939] 3 All E.R. 833), *Diggins v. Diggins* (11) ([1927] P. 88), *Jones v. Jones* (12) ((1929), 142 L.T. 168) and others, which have laid down that the element of misconduct is implicit in the words "wilful neglect to provide reasonable maintenance"†, I think that the wife has failed to prove her case, from whichever point of view one looks at it.

- G One must recognise, as a matter of realism, that this cannot be the end of the story, but we are only concerned with the case as it stands. We have been asked to refer it back to the magistrates, but I do not think that in the circumstances that is the proper solution. I think that the wife set out to prove this case in a jurisdiction where she was entitled to prove it, and where it was practically impossible for the husband to attend to give evidence, and I think that,
- H she having failed to prove her case, the order should be set aside, and I propose that that is what should be done.

HEWSON, J.: I agree with what the learned President has just said. Counsel for the wife said that since two officials had been investigating the matter

I on behalf of the wife and on behalf of various charitable organisations, it must be or might be inferred that the husband had been informed of his wife's condition, but I can see no substance in that argument at all. Both of those officials were in Welshpool and not in Cardiff, and were only the local representatives in Welshpool. There is not a shred of evidence that the husband in this case

* *Lilley v. Lilley*, Oct. 29, 1958, post.

† I.e., the words in the Summary Jurisdiction (Married Women) Act, 1895, s. 4: 11 HALSBURY'S STATUTES (2nd Edn.) 849, 850.

was ever informed of his wife's circumstances, or that the wife ever made them known to him. I entirely agree with the learned President that this order should be set aside. A

Appeal allowed. Order set aside.

Solicitors: *John T. Lewis & Woods*, agents for *Norman Morgan & Davies*, Cardiff (for the husband); *Gregory, Rowcliffe & Co.*, agents for *Harrison & Sons*, Welshpool (for the wife). B

[*Reported by A. T. HOOLAHAN, Esq., Barrister-at-Law.*]

THE WORKING MEN'S CLUB AND INSTITUTE UNION, LTD. v. SWANSEA CORPORATION.

[QUEEN'S BENCH DIVISION (Lord Parker, C.J., Cassels and Streatfeild, JJ.),
October 15, 16, 17, 1958.]

Rates—Limitation of rates chargeable—Union of working men's clubs—Whether main objects concerned with the advancement of "social welfare"—Rating and Valuation (Miscellaneous Provisions) Act, 1955 (4 & 5 Eliz. 2 c. 9), s. 8 (1) (a). D

The purpose of an organisation, formed in 1862 by a clergyman and carried on under eminent presidents, was to encourage working men to join together in working men's clubs. The organisation was a union, of which only individual working men's clubs could become members, and its aim was to encourage the formation of such clubs, to assist them, and to enable the working men themselves to run both the clubs and the union. In 1889 the union was registered and incorporated under the Industrial and Provident Societies legislation, and thereafter continued to be so registered. The rules of the union thus incorporated provided (r. 2) that "The objects of the union are: To carry on the business of general advisers, teachers of the doctrine of association for social or ameliorative purposes [and there then followed a list of commercial activities which the union might carry on, ending with] and manufacturers . . . of any article which may assist the development of clubs or their members. To provide and maintain convalescent homes, or other institutions for the benefit of the members or wives or children or dependants of the members of clubs which are members of the union." E
The union was successful. In 1889 it was almost self-supporting. In 1925 the number of member clubs had risen to 2,469 and by 1955 there were 3,420 such clubs with a total membership of just under two millions. By 1955 the purpose of enabling working men to run the union had long been accomplished, no distinguished patrons remained, the union was self-supporting and had a substantial taxable income, and its main activity consisted of helping the clubs which had already been formed and had become members. On the question whether a convalescent home run by the union was "occupied for the purposes of an organisation . . . which is not established or conducted for profit and whose main objects are . . . otherwise concerned with the advancement of . . . social welfare", so that the rates in respect of the convalescent home would be limited under s. 8 (1) (a) and (2) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, F
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Held: (i) the union was not established or conducted for profit within the meaning of s. 8 (1) (a) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955.

Dictum of LORD DENNING in *National Deposit Friendly Society (Trustees) v. Skegness U.D.C.* ([1958] 2 All E.R. at p. 612) applied.

(ii) (CASSELS, J., dissenting) the union was an organisation whose main

A objects were concerned with the advancement of social welfare within s. 8 (1) (a) and it was, therefore, entitled to limitation of rates in relation to the convalescent home for the following reasons—

(a) the original main object of the union was to encourage working men to form working men's clubs and that purpose was within the words "advancement of . . . social welfare" in s. 8 (1) (a), though if the clubs, which were
B not organisations within that enactment, had joined together for their own advantage, a central organisation so formed would not have been within s. 8 (1) (a).

National Deposit Friendly Society (Trustees) v. Skegness U.D.C. ([1958] 2 All E.R. 601) distinguished.

(b) when the union was incorporated, the main object expressed in r. 2
C of the union's rules, viz., to carry on business as general advisers and teachers of the doctrine of association for social or ameliorative purposes, continued the same purpose of encouragement of men to join into working men's clubs which had originally existed, and accordingly the main object of the incorporated union was also advancement of social welfare within s. 8 (1) (a).

(c) notwithstanding the success of the union, and the facts that many
D clubs had been formed, that the union was self-supporting and that its activities now consisted mainly in helping clubs that already had been formed and had become members (though, semble, it was not permissible to have regard to the activities of the union as distinct from its constitution), the original main object of the union had persisted and remained throughout,
E so that the union was still an organisation whose main objects were concerned with the advancement of social welfare.

Appeal allowed.

[For the Rating and Valuation (Miscellaneous Provisions) Act, 1955, s. 8 (1), see 35 HALSBURY'S STATUTES (2nd Edn.) 394.]

F Cases referred to:

(1) *National Deposit Friendly Society (Trustees) v. Skegness U.D.C.*, [1958] 2 All E.R. 601.

(2) *Berry v. St. Marylebone Corpn.*, [1957] 3 All E.R. 677; 3rd Digest Supp.

Case Stated.

This was a Case Stated, at the instance of the appellant ratepayers, by the
G Deputy Recorder of Swansea (RODERIC BOWEN, ESQ., Q.C.), sitting at Swansea Borough Quarter Sessions. On Dec. 18, 1956, the deputy recorder dismissed the ratepayers' appeal, under the Poor Relief Act, 1743, s. 4, against the amount of rates assessed to be paid in respect of their convalescent home at Langland Bay, Swansea. The facts appear in the judgment of LORD PARKER, C.J.

J. T. Molony, Q.C., and *J. M. Milne* for the appellants, the ratepayers.

H *G. D. Squibb, Q.C.*, and *B. M. Rees* for the respondents, the rating authority.

LORD PARKER, C.J.: This is another of those difficult cases arising out of s. 8 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955. The relevant words of the section are as follows:

"(1) This section applies to the following hereditaments, that is to say—
I (a) any hereditament occupied for the purposes of an organisation (whether corporate or unincorporate) which is not established or conducted for profit and whose main objects are charitable or are otherwise concerned with the advancement of religion, education or social welfare . . ."

This case comes before the court on a Case Stated by the deputy recorder of Swansea Borough Quarter Sessions, before whom the appellants, the Working Men's Club and Institute Union, Ltd., appealed against an amount of rates assessed on them in respect of their convalescent home at Langland Bay, Swansea, claiming that they were entitled to relief under the section to which I have

referred. The learned deputy recorder held that they were not entitled to such relief, and the only issues on the section which come before this court are two: first, whether the appellants are an organisation which is not established or conducted for profit—and as to that the appellants have a finding by the deputy recorder in their favour—and, secondly, whether their main object or objects are otherwise concerned with the advancement of social welfare. As to that, the deputy recorder held that their main objects were not of such a character. A

Quite shortly, the history of the appellants is as follows. In 1862 there was formed what was called the Working Men's Club and Institute Union. It did not then have the "Limited" as part of its name. It was formed in order to encourage persons, referred to as the working men, to band together in working men's clubs. I refer to a few passages out of the Short History of the Union*: it appears on p. 4 that the union owed its beginning B

"to a Unitarian clergyman, the Reverend Henry Solly, a passionate soul, keenly conscious of the low level of working-class life, keen and eager to raise its habit and character, who saw in the establishment of working men's clubs an instrument to his purpose." C

It goes on to refer to a meeting in 1862, presided over by LORD BROUGHAM, who was Lord Chancellor at the time. The union continued to have very eminent vice-presidents thereafter. I pass then to 1875, when Lord Rosebery was presiding; a speech of his, which is set out in the book, contained the following passage (*ibid.*, at p. 13): D

"The principle on which the Working Men's Club and Institute Union is based is that the working men are to be raised by their own endeavours, and are not to be patronised, and fostered and dandled. All that is to be done for the working men is to be done by themselves. What a man does for himself is worth ten times as much as what can be done for him by anyone else . . . This union is a central authority which guides and supports the spontaneous endeavours of the working men living in provincial towns. It lets fall the good seed in places where it has not hitherto fallen, and what is even of more importance than this, it embodies the entire experience of the movement from its very foundation, and is, therefore, able to give the best advice to all clubs which may need it. The influence of this central authority is felt all over the country." E

Then, in setting out various of the considerations he says (*ibid.*, at p. 14): F

"Thirdly, they ought to set before their members some object higher than the mere social object of getting a comfortable place in which to meet." G

That was in 1875, and the union prospered. It got more and more clubs formed, and those clubs became its members, and it appears that (*ibid.*, at p. 18)

"From 1875 onward, the distinguished patrons gradually faded away, as the era of democratic government and self-support dawned and developed." H

By 1888 the union was very nearly self-supporting, and on Apr. 18, 1889, the union was registered under the Industrial and Provident Societies Act of 1876. The book says (*ibid.*, at p. 21) that the union was registered, as are almost all co-operative societies, under the Industrial and Provident Societies Act, and rules were drafted with the assistance of certain gentlemen and adopted. I

"So complete were they, that although they have been subject to slight subsequent amendment, principally to give effect to the more complete representation of the provinces on what is now really and truly a national executive (though often misnamed 'the London Executive'), this constitution of the union, completely democratic, remains almost as first drafted."

* I.e., "A Short History of the Working Men's Club and Institute Union", published by the Union in 1927.

A Then there appears (*ibid.*, at p. 25) a table showing the progress of the union between 1887 and 1925. By 1890, that is to say, the time of registration, the number of clubs who were members of the union was some 384; by 1925 it had risen to 2,469, and by 1955, the relevant year that is under consideration, the organisation had some 3,420 clubs as members, and those 3,420 clubs themselves had a total membership of just under two millions.

B In the chapter headed "The Union's Aim", there appears this (at p. 68):

"Briefly to state these ideals and beliefs. The first aim and ideal of the union is to secure for the workman a higher and wider level of happiness in his leisure hours and in his daily personal and civic life. And the principal belief of the union is that this can best be achieved by the workman himself, free from assistance, interference, or dictation by others. Supplementary to this, or part of this task, is to afford guidance and assistance in every amplification and ramification of all that is comprised within it. To make its club members self-reliant, through common effort, to train them in skill in self-government individual as well as corporate, to assure that their efforts 'for themselves and by themselves' shall be fruitful, both in individual, domestic and the common good, that both the member, his dependants and the community shall be the better because of the clubs' establishment, those were the ideals of the founders, they are the ideals of the union now."

The booklet says (*ibid.*, at p. 70):

"Whilst it would desire every bona fide club to be within its ranks, it asks no club to join, and very closely scrutinises the character of any club which seeks membership . . . There are publications issued by the union which advocate the establishment of working-class clubs, and, if any group of men get together in spontaneous local effort, with the object of forming a club, or call a meeting to consider the subject, the union will send a speaker and adviser. This is the whole of its propaganda. It has no paid organisers, no peripatetic proselytising preachers . . . And if at the very beginning the men who think of promoting a club find contact with the union, then from the beginning all is well with the child. And here can be set out just what the union does. Its aim is that every club born shall grow up to health and usefulness. To that end it must be reared upon a basis of legality and right conduct, moral and material. The union secures that it shall begin on right lines and makes the path straight."

G The book sets out (*ibid.*, at p. 74) the legal advice it gives and, indeed, boasts that it has never been found wrong on a point of law. That appears from the short history.

As I have said, the union was registered under the Industrial and Provident Societies Act, 1876, and, under that Act, rules had to be registered. The only rules before the court are the recent rules, the copy of which that I have is dated 1956; but I take it, from what I have read in the little red book, that, at any rate as far as its objects are concerned, they are the same to all intents and purposes as they were in 1889 when registration took place. They are in these terms: Under "Name": "The society shall be called the Working Men's Club and Institute Union, Ltd.": that is because, under the Act, it becomes incorporated. Then under para. 2:

I "The objects of the union are: To carry on the business of general advisers, teachers of the doctrine of association for social or ameliorative purposes [I pause there for a reason I will state in a moment; and then it goes on] publishers [that is, to carry on the business of publishers], stationers and booksellers, general traders, agents and manufacturers, both wholesale and retail, of any article which may assist the development of clubs or their members. To provide and maintain convalescent homes, or other institutions for the benefit of the members or wives or children or dependants

of the members of clubs which are members of the union. The union shall have full power to do all things necessary, expedient, or considered by it desirable for the welfare and protection or assistance of, or helpful in any manner to, its members, and for the accomplishment of all objects specified in its rules."

I shall have to come back to the rules in a moment, but, in my view, properly read, that objects clause is setting out a main object, namely, to carry on the business of general advisers and teachers of the doctrine of association for social or ameliorative purposes, and under the name of the Working Men's Club and Institute Union, Ltd. All that follows, in my view, although stated as objects, are really the means whereby the object stated in the first three lines is going to be carried out. That is all that I need state of the facts at the present stage.

The first question is whether this organisation, to use the words of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, s. 8 (1) (a)*, is established or conducted for profit. That it makes profits which are profits for the purposes of taxation is perfectly clear. It owns very considerable securities, which earn interest, and properties and, to take the position of the general fund, in the annual report of 1955 it shows that the interest on certain securities alone amounted to £4,445 12s. 7d., and in addition there was bank interest and interest on Co-operative Wholesale Society Bank Deposit Account, so that they clearly make profits in that sense. Their receipts, apart from the interest on securities, are the annual payments of the member clubs, who pay a maximum of £2 a year—it is 10s. for each hundred members, with a maximum of £2. In addition, however, they get a very large sum by way of receipts from what are called associate and pass cards, which enable a member of any member club to be an honorary member of other member clubs.

Now it has been said more than once that the fact that an organisation makes profits is, of course, not the question to be considered. The question is, is it established or conducted for profit? The matter was referred to by LORD DENNING in *National Deposit Friendly Society (Trustees) v. Skegness U.D.C.* (1) ([1958] 2 All E.R. 601), where, in dealing with the friendly society in that case, he said (*ibid.*, at p. 612):

"Looking at the way in which the society has conducted its affairs, I am of opinion that it has made profits. It has not distributed those profits like a commercial company. Nor has it returned them to members. It has used them to build up large and accumulating reserve funds. But the fact that the society has made profits does not mean that it is 'conducted for profit', which I take to mean 'conducted for the purpose of making profit'. Many charitable bodies, such as colleges and religious foundations, have large funds which they invest at interest in stocks and shares, or purchase land which they let at a profit. Yet they are not established or conducted for profit."

Everything that LORD DENNING said there, as it seems to me, applies in the circumstances of this case. I agree with the deputy recorder's finding that here this organisation was not established or conducted for profit.

The next question is whether its main object is the advancement of social welfare. Those words have given rise to great difficulty and nobody has yet, perhaps wisely, laid down what is considered an exhaustive definition of those words. Indeed, it has been said that the words "social welfare" alone, leaving out their context in that section, and the words "advancement of" which precede them, are of the very widest character. The question here is, was the main object for the advancement of social welfare?

* The terms of the enactment are printed at p. 415, letter I, ante.

- A It is perfectly clear that the member clubs themselves could not come within those words and qualify for relief. The individual clubs are members banding together for their own advantage and benefit, and there is not there the public element which all agree, I think now, must be present if an organisation is going to fall within the section. But the question remains: what is the position of the union, the appellants, the central, as it were, organisation? I confess
- B that it is a matter which has given me considerable doubt. If, of course, member clubs which had formed over a period of years decided to band together for their own advantage and form a central organisation or union which would assist them and benefit them and to which they paid contributions, I think that the matter would fall directly within the decision in *National Deposit Friendly Society (Trustees) v. Skegness U.D.C.* (1) and that the central body could not
- C qualify for relief.

That is not, however, this case. This case, as it seems to me, is the case of an organisation originally, in 1862, setting out to encourage the working man to form these working men's clubs, and I think that the encouragement of men to do that would fall fairly and squarely within the words "advancement of social welfare". Indeed, if the matter rested there I do not think that counsel

D for the rating authority would deny that result. The matter does not, of course, rest quite there, because a time came when this organisation became self-supporting: when it had become so successful, if you like, that the activity of encouraging working men directly to band together had rather fallen into the background, and when the main activity consisted of helping the clubs which had already been formed and which had become members.

E The proper approach here, as in all these cases, is to consider first the written constitution* and the objects there laid down. It is only in two events that one is entitled to go outside those objects. One is that if, on a reading of the constitution, it is impossible to see which are the main objects out of a series of objects, then one is entitled to look at the activities; secondly, even if one can find what appears to be a main object in the constitution but it is ambiguous,

F again one would be entitled to look to the way in which the organisation has acted. Accordingly, I would look, first, at r. 2, which I assume, as I said, was to all intents and purposes the same rule as in 1889 and, as I have already said, it seems to me, on a reading of that rule, that one arrives at one main object, namely, to carry on the business of general advisers and teachers of the doctrine of association for social or ameliorative purposes.

G Those very wide words, as it seems to me, fall plainly within the description of having an object for the advancement of social welfare, and I doubt very much if one is entitled to go any further. I would add that it seems to me that in the present case the deputy recorder has not followed that course: indeed, he barely refers to the construction of r. 2 but looks directly at the activities of the organisation and comes to the conclusion that the first activity, which he

H holds to be the main object, was, if I may put it quite generally, to benefit the member clubs and their members. Now it seems to me that, even if one is entitled to go outside r. 2, there is no reason for beginning the consideration at the year 1889, when this organisation was incorporated. Of course, there might have been completely new objects then, but, on the interpretation that I have stated, that is not this case. From the very beginning the object here

I has not been to benefit the members; the main object has not been to benefit such clubs as become members, but to encourage the working men to band together to form clubs, and then, incidentally, to assist those clubs which are formed and which do become members and, if only by example, to encourage the working men to form further clubs. This is certainly not a case where that object has been exhausted. It is true that there is a very large membership, but it is noticeable that, between 1925 and 1955, no fewer than one thousand

* See, e.g., *Berry v. St. Marylebone Corpn.* ([1957] 3 All E.R. 677, letters H, I).

new member clubs have joined, and it is said that the working man himself is the best missionary: that he may go from his own district to another preaching the benefits of his local working men's club. I am satisfied that the original object has persisted throughout, and, although it may be that to-day the chief beneficiaries are the member clubs, nevertheless the original object remains. If I may repeat again, this is not a case of clubs which have banded together into a central organisation for their own benefit, but of a central organisation beginning to encourage the growth of clubs and, when those clubs are formed, incidentally to benefit those clubs.

Accordingly, I take the view, as I said not without considerable doubt, that this organisation has shown that it comes within the section. I would allow this appeal.

CASSELLS, J.: It is with no little diffidence that I find myself unable to agree with the conclusion at which my Lord has arrived.

The working men's club movement goes back into history, and doubtless in its early days one finds that men of eminence have come together at meetings to encourage working men to form themselves into clubs, which in fact they had at that time in some instances formed, and to encourage further the increase or the wider spreading of the movement whereby the working men themselves had made their own places where they could have recreation and the advantages of association and, incidentally, the advantages of beer to be drunk in pleasant surroundings and to meet their fellows while they were so enjoying themselves. It is a movement which has spread.

This appeal, by way of Case Stated, comes before this court because the appellant Working Men's Club and Institute Union, Ltd., which, indeed, has a very long history, desires to succeed in an appeal against the rating of one of its convalescent homes, and among the advantages of belonging to a working men's club is that not only can the members get reasonable and cheap recreation and refreshment, but also that the members, by reason of a contribution which is made by the individual club to the union, can obtain the advantage of attending a convalescent home. This home was rated at one time at a figure which, under this recent valuation for rating purposes, has been multiplied by five, and the very natural course for the union to adopt is to carry this case to higher courts in order to see whether they do or do not come within the partial relief—indeed, I think I may say the temporary relief—which is granted under s. 8 (1) (a) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955. This enactment provides that relief shall be given in relation to:

“any hereditament occupied for the purposes of an organisation (whether corporate or unincorporate) which is not established or conducted for profit and whose main objects are charitable or are otherwise concerned with the advancement of religion, education or social welfare.”

I agree with my Lord, if I may say so with respect, and I am satisfied that the appellants here have not a business which was established or conducted for profit. It would be difficult to say that they do not come within that part of the section.

What we are mostly concerned with is whether they come within the words “social welfare”. For that purpose I am prepared to go to the objects of the union, which are, as I read here:

“To carry on the business of general advisers, teachers of the doctrine of association for social or ameliorative purposes, publishers, stationers and booksellers, general traders, agents and manufacturers, both wholesale and retail, of any article which may assist the development of clubs or their members. [Then there is a further passage which seems to divide these objects a little bit] To provide and maintain convalescent homes, or other institutions for the benefit of the members or wives or children [incidentally,

- A that is where one finds that the wives of members can obtain the benefit, but according to learned counsel appearing for the respondents here wives and children, I understand, do not get these benefits] or dependants of the members of clubs which are members of the union. The union shall have full power to do all things necessary, expedient, or considered by it desirable for the welfare and protection or assistance of, or helpful in any manner to,
- B its members, and for the accomplishment of all objects specified in its rules."

Clubs can become, as clubs, members of this union by the payment of 10s. per hundred members, and the total payment they make is limited to the sum of £2. Then in addition to that the union obtains from the clubs a payment of one penny on each card which is sold to the members of the club; which gives them the benefit of associate membership of all other clubs, so anyone who joins the one club and travels anywhere in the country and finds another club which belongs to the union can get the advantages of that club. But that is not the only thing the union does. It exercises, in my view, a considerable control over these clubs. The clubs can be disbanded if they do not comply with certain rules. One rule I have observed is r. 6 (c):

- D "A club which supplies intoxicating liquor shall not be admitted, or, if admitted, shall not continue as a member unless it adopts the following rule, or a rule to similar purpose or effect:—'Should any visitor pay for intoxicating liquor served to him he shall at once be removed from the club premises, and the member introducing such visitor may be expelled from membership on the fact being duly proved; and it shall be the duty
- E of any officer or member of the club, becoming aware of such breach of the rules, to report it at once to the secretary or committee'. (d) A club which supplies intoxicating liquor shall not be admitted or, if admitted, shall not continue as a member which shall have bound or shall bind itself to deal with any brewer, distiller or other tradesman."

- F There is that control which is exercised over individual clubs. Further, if any visitor to a club should go in and pay for drink, then it comes under the castigation of the union. It seems to my mind, speaking entirely for myself, that this union, admirable though its objects may be and worthy as the movement is, does exercise a considerable control over the management of the individual clubs. In addition to that, the union provides assistance to clubs, helping with their accounts and advising them what they should do. True it is that the
- G union have arrangements whereby speakers may go to any body of men who have banded themselves together and expressly desire to form a working men's club to address them and indicate, doubtless in well-selected phrases, the great advantage of forming a working men's club in that particular neighbourhood. This undoubtedly is of more importance during these times in which we live because new towns are being created and so called. It may well be that in
- H those new towns people will be wanting to form a working men's club.

- That is all very well, but the real issue in this case is: is that social welfare? What is it these people band themselves together for? I can see no other reason than their own social benefit, their own recreation and their own enjoyment, and this union, exercising this control, giving them advice and helping them where it can, is doubtless serving a most useful purpose but is it doing
- I what the Act requires it should do, namely, promoting the advancement of social welfare? The banding together of individuals into a social club is not, in my view, social welfare, and when the learned recorder came to the conclusion that the main object was not otherwise concerned with the advancement of social welfare, speaking for myself I have come to the conclusion that he was right. I will read the paragraph in the Case:

"The reasons for this decision were: (i) Counsel for the organisation conceded that the member clubs could not claim the relief granted in s. 8

(1) (a) in respect of their premises [so perhaps we would have not an impossible situation but we would have this, that the units of this union would not be able to claim this relief but the union itself could]. (ii) A main object must, if it is to be 'concerned with the advancement of social welfare', have a substantial element of benevolence, philanthropy, some form of humanitarianism, altruism and a disposition to do good, not merely a desire to promote social pleasure and social activities as a whole."

Now the altruism point is a point which has emerged in the course of the cases which have reached the higher courts*, and I quote from LORD DENNING in *National Deposit Friendly Society (Trustees) v. Skegness U.D.C.* (1) ([1958] 2 All E.R. 601), to which my Lord has already referred. I will not read the whole paragraph, but he says (*ibid.*, at p. 614):

"The words 'social welfare' themselves also connote, to my mind, the concept of public benefit. These words comprehend many objects which are beneficial to the community but are not charitable according to the somewhat limited interpretation given in the charity cases. A person is commonly said to be engaged in 'social welfare' when he is engaged in doing good for others who are in need—in the sense that he does it, not for personal or private reasons—not because they are relatives or friends of his—but because they are members of the community or of a portion of it who need help . . . The difference between the two is that the main objects of the one are directed to the public benefit whereas the others are not."

It is said that this union is for the public benefit because the membership of 3,400 clubs is affiliated, if I may use the word, to the union: their members have become members of the union and have reached the enormous figure of two millions, but I do not think that that makes any difference. I do not see why, if a thing is not social welfare for five hundred, it becomes social welfare when it goes over two millions. This is a limited movement as far as the population is concerned. No club can become a member of this union unless it conforms to certain requirements, and, indeed, the record of the union shows that some clubs have left the union, and, of course, others are perhaps coming in; but the mere fact that this is a union of working men's clubs does not make it entitled to come under the social welfare part of the Act of 1955. The learned recorder, in his concluding paragraph, said:

"The main object of the organisation, although social in character and directed towards providing pleasure and comfort for the members of the member clubs, is not concerned with 'the advancement of social welfare'."

I venture to agree with the conclusion at which the learned recorder arrived and I would dismiss this appeal.

STREATFEILD, J.: In my turn I also have diffidence in differing from my brother CASSELS; and in saying that I agree with my Lord, the Lord Chief Justice, I also share the doubt which he expressed. It is not by any means an easy case. There are two main points for consideration. The first one is, I think, quite simple: it is whether this organisation, the Working Men's Club and Institute Union, Ltd., was an organisation which was then established or conducted for profit. It was said that, because it was registered under the Industrial and Provident Societies Act of 1893 as a business, that automatically pointed to it being established or conducted for profit.

In order to attract or qualify for registration under that Act an organisation must be either an industry or business or trade†. This one was clearly neither

* See also *Independent Order of Odd Fellows Manchester Unity Friendly Society v. Manchester Corpn.*, p. 378, ante.

† See the Industrial and Provident Societies Act, 1893, s. 4, and, generally, 21 HALSBRUY'S LAWS (3rd Edn.) 9 et seq.

- A an industry nor a trade. So, if it were to qualify, it had to call itself a business. It does not follow, in my view, that because the Act contains certain provisions for the distribution of any surplus assets which may exist on the winding-up of an institution amongst the members, that means that it is established for profit. Suffice it to say that I follow the language of LORD DENNING which my Lord has already read out and which I need not repeat, in the *National Deposit Friendly Society (Trustees) v. Skegness U.D.C.* (1) ([1958] 2 All E.R. 601 at p. 612), and, for the reasons stated by LORD DENNING, which appear to me exactly to fit the present case, I have no hesitation in saying that, although there may be profits which attract tax, this organisation was not established or conducted for profit.

- C The next point is whether, not being charitable, the union was otherwise concerned with the advancement of social welfare, and it is quite correct, and I agree, that there must be an altruistic basis for the objects of this organisation.

- I agree with my Lord, the Lord Chief Justice, that one must go back in order to ascertain the main objects of the business to its history, to its inception, and in the early days it seems to be quite clear that the union was an organisation of, it was said, titled and benevolent gentlemen who desired, within the ideals of the organisation, to foster, if not the promotion of working men's clubs, at any rate their betterment by giving them advice. Had the union been a formation or organisation of existing members' clubs who united together in a union for the betterment of themselves in the first instance, I should have agreed that this could not be for the altruistic social benefit, but this was, in its inception, organised by others for the benefit of working men. I would also stress the passage on p. 68 of the "Short History of the Union", as to the ideals, in its inception, of this organisation. My Lord has read it*, but I would stress that the idea behind this very laudable organisation was not only to secure a higher and wider level of happiness in the leisure hours and daily personal and civic life of the working man, but also was that this could "best be achieved by the workman himself, free from assistance, interference, or dictation by others". The whole object of this association was to encourage the running of working men's clubs, to improve them, and gradually, by the example of one set to another, to spread the gospel right through the working community and right through the nation quite unrestricted as to trades and quite unrestricted as to area. The fact that it was at all times the goal of this organisation that eventually the union might become self-supporting, that it should be free from assistance, that it should be for themselves and by themselves, does not, to my mind, detract from the main object of the organisation in its inception, viz., that it was for the benefit of working men and was organised and, in the first instance, financed by titled and benevolent gentlemen. That, to my mind, was the basis of the foundation of the union, and it finds expression in r. 2, which we have to construe. It is only in the event of there being any doubt which is the main object or whether there is any ambiguity in expression that we are entitled, on the authorities, to look at the actual activities of the union, and for that this court is bound by the judgment of the Court of Appeal in *Berry v. St. Marylebone Corpn.* (2) ([1957] 3 All E.R. 677), and, in particular, by the passages on p. 682 of the report.

The expressed objects of the union are:

- I "To carry on the business of general advisers, teachers of the doctrine of association for social or ameliorative purposes . . ."

I agree† that in those words is really the expression of the objects of this union. The other matters which follow in the objects expressed in r. 2 are in effect the means of achieving the main object of being "general advisers, teachers of the doctrine of association for social or ameliorative purposes".

* See p. 417, letters B to D, ante.

† See p. 419, letters F and G, ante.

Now, it seems to me, those words quite clearly are the main object of the union, A
 and I do not think that they are ambiguous so as to entitle us to look at the
 actual activities of the member clubs of the union as it is now carried on. Even
 if it did, I should find difficulty in holding that, by reason of the success of the
 union in increasing the membership from something very small to the present
 3,400 odd clubs and two million members, and because one can draw a line
 round about 1890 when the financial position was such that the organisation B
 became self-supporting—it having been at all times the object of the original
 founders to make the union self-supporting—the organisation, although started
 as social welfare, ceased to be social welfare from the moment when it became
 self-supporting, because that successful stage had been reached. I find
 difficulty in accepting counsel for the rating authority's submission that, from
 that moment at any rate, the union became an organisation of workmen to help C
 themselves. I do not think that the main object changed when the organisation
 achieved the success which it had always intended of making itself self-supporting.

For those reasons I have come to the conclusion that this case is not like a
 mutual insurance benefit case. It is not, as my Lord said, a case of existing
 clubs uniting and riding on the back of a central organisation in order to improve
 themselves and encourage other workmen. Indeed, it started at the instance D
 of others to help those others who at that time were not able to help them-
 selves and eventually to bring them to the self-supporting stage I have indicated.
 Looking at the rule [r. 2 of the union's rules] and construing it as best I can,
 I have come to the conclusion that the main object of this organisation was an
 object which was concerned with the advancement of social welfare. Un- E
 doubtedly it started as such, and I do not think that anything that happened
 subsequently prevented it from remaining the advancement of social welfare.
 I do not think, with respect to my brother CASSELS, that the test is as to how
 much control the organisation had over any individual clubs if, indeed, it had
 any control. The fact that it laid down certain conditions of membership
 such as the observance of licensing laws and not being tied to any particular
 brewers and matters of that sort, is to my mind only part and parcel of the F
 object of teaching and advising clubs as to the proper way of bettering their
 own clubs. I do not think that that control prevents this organisation from
 being one for the advancement of social welfare.

For those reasons, therefore, I have come to the conclusion that the Working
 Men's Club and Institute Union, Ltd., brought itself within the terms of s. 8
 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, and I too G
 would therefore allow this appeal.

*Appeal allowed, with a direction that, in the opinion of the court, the appellants
 are entitled to relief.*

Solicitors: *Wrentmore & Son*, agents for *Edward G. Davies*, Pontyclun (for
 the appellants, the ratepayers); *Kenneth Brown, Baker, Baker* (for the
 respondents, the rating authority).

[Reported by HENRY SUMMERFIELD, ESQ., Barrister-at-Law.]

A **R. v. LLOYD-JONES AND ANOTHER, *Ex parte* THOMAS.**

[QUEEN'S BENCH DIVISION (Lord Parker, C.J., Streatfeild and Diplock, JJ.), October 27, 1958.]

B *Quarter Sessions—Committal of offender to, for sentence—Arrest—Bench warrant—Offender failing to surrender to bail—Whether quarter sessions had jurisdiction to issue bench warrant—Criminal Justice Act, 1948 (11 & 12 Geo. 6 c. 58), s. 29 (3) (a)—Magistrates' Courts Act, 1952 (15 & 16 Geo. 6 & 1 Eliz. 2 c. 55), s. 29.*

C Quarter sessions have power to issue a bench warrant for the arrest of a person who, having been committed to quarter sessions for sentence under s. 29 of the Magistrates' Courts Act, 1952, and having been granted bail pending appeal, fails to surrender to his bail; such power is implicit in s. 29 (3) (a) of the Criminal Justice Act, 1948, which shows that quarter sessions are put in the same position as if the offender had just been convicted before them on indictment.

D [As to proceedings when the defendant does not appear, see 10 HALSBURY'S LAWS (3rd Edn.) 400, para. 723.

As to the procedure before quarter sessions on committal for sentence, see 25 HALSBURY'S LAWS (3rd Edn.) 298, para. 580, and p. 229, para. 423.

E For the Criminal Justice Act, 1948, s. 29 (3), see 14 HALSBURY'S STATUTES (2nd Edn.) 1014; and for s. 29 of the Magistrates' Courts Act, 1952, see 32 HALSBURY'S STATUTES (2nd Edn.) 449.]

Cases referred to:

- (1) *R. v. Browes*, [1949] 2 All E.R. 449; 113 J.P. 454; 33 Cr. App. Rep. 164; 2nd Digest Supp.
- (2) *R. v. Grant*, [1951] 1 All E.R. 28; [1951] 1 K.B. 500; 115 J.P. 36; 34 Cr. App. Rep. 230; 2nd Digest Supp.

F **Motion for Mandamus.**

The applicant, William Francis Thomas, chief constable of the Cardiff City police force, moved for an order of mandamus directed to the recorder of Cardiff, H. V. Lloyd-Jones, Esq., Q.C., or, alternatively, to the assistant recorder, Frederick Elwyn Jones, Esq., Q.C., the respondents, requiring either of the respondents to issue a bench warrant for the arrest of one, John Charles Platt. The grounds of the application were that the assistant recorder was wrong in refusing to issue a bench warrant on the ground that Platt had not been committed to quarter sessions on indictment and, therefore, quarter sessions had no jurisdiction to issue a warrant; that he had jurisdiction to issue the warrant and that he should have issued it. The facts are set out in the judgment of

H LORD PARKER, C.J.

J. F. E. Stephenson for the applicant.

The respondents did not appear and were not represented.

I **LORD PARKER, C.J.:** On Apr. 18, 1958, Platt was convicted before the magistrates' court on three charges of larceny, and he was committed to the next quarter sessions for the City of Cardiff for sentence under s. 29*. The prisoner then gave notice of his intention to appeal against conviction, and in June he was granted bail by ASHWORTH, J., in London, conditional on his reporting daily to the police, bail being in his own recognisance in the sum of £20.

* I.e., s. 29 of the Magistrates' Courts Act, 1952, which replaced s. 29 (1) of the Criminal Justice Act, 1948, repealed by s. 132 of and Sch. 6 to the Act of 1952. The consequential provisions remain in s. 29 (2)-(5) of the Criminal Justice Act, 1948, as amended.

On Aug. 14, 1958, his appeal came on before quarter sessions, but he did not appear or surrender to his bail and in due course his appeal was dismissed by the assistant recorder. Thereupon it became the duty of the assistant recorder to consider the question of sentence which had been remitted under s. 29. He was asked to issue a bench warrant for the prisoner's arrest, and, though one does not blame him in the slightest, he decided that in all the circumstances he had no power to do so. The applicant then came before the judge in chambers in London who said that he did not think that he had power to issue the warrant and, in those circumstances, the matter has come before this court. A B

It seems clear that somebody ought to have power to issue a bench warrant and, indeed, the person seized of the matter before whose court the case has come, namely, the recorder of the City of Cardiff, but the question is whether he has. For myself, I do not at the moment see why any court seized of a matter should not have power to issue a warrant in circumstances such as these, where a prisoner fails to surrender to his bail. One would think that the position was that every court would have inherent power to do so, but as far as I can see the matter has not proceeded quite on those lines, for if one looks at ARCHBOLD'S CRIMINAL PLEADING AND PRACTICE (33rd Edn.), p. 71, it would appear that it has been the practice C D

"that any court of record before which an indictment is preferred and signed may forthwith issue a bench warrant . . . Where a party against whom the indictment has been preferred and signed is already under recognisance to appear and answer any indictment that may be preferred against him, and he does not appear, the prosecutor may bespeak a bench warrant, which will be signed by the justices at the close of the sessions." E

The form of bench warrant set out at p. 72 of ARCHBOLD, calls on "A.B., who stands indicted before us . . . to answer the said indictment". In regard to magistrates' courts there was doubt, apparently, for a considerable time whether magistrates had power to issue a warrant, and indeed by s. 67 of the Criminal Justice Act, 1948, they were given express power to do so, that enactment being now replaced by s. 97 of the Magistrates' Courts Act, 1952. Still, whatever the position may be with regard to inherent powers, in my judgment there is sufficient ground to be found in the Criminal Justice Act, 1948, itself to say that the recorder in such circumstances has power. Sub-section (3) of s. 29 of the Act of 1948 provides: F G

"Where an offender is so committed for sentence as aforesaid, the following provisions shall have effect, that is to say:—(a) the appeal committee or court of quarter sessions shall inquire into the circumstances of the case, and shall have power to deal with the offender in any manner in which he could be dealt with by a court of quarter sessions before which he had just been convicted of the offence on indictment." H

It is clear from that that when quarter sessions begin to inquire into the matter with a view to dealing with the offender they are put in the same position as if the offender had just been convicted before them on indictment. Indeed, in the two cases to which we have been referred, *R. v. Browes* (1) ([1949] 2 All E.R. 449), and *R. v. Grant* (2) ([1951] 1 All E.R. 28), the Court of Criminal Appeal said that where sub-s. (3) (a) speaks of the prisoner being treated as if he had just been convicted on indictment, that would be so for the purposes of making an order under s. 22 (1) of the Act of 1948, for supervision, which can only be made on indictment and also for the purposes of the service of notices under s. 23 of i

- A the Act of 1948, which provides that the notice must be served at least three days before the trial. Moreover the court held that three days before the trial in circumstances such as these meant three days before the hearing at which quarter sessions would be dealing with the matter as if they had just convicted on indictment, as if they had just tried the man. Finally, it is to be observed that by sub-s. (6) of s. 21 of the Act of 1948, a person who has been convicted
- B of a summary offence and then sentenced by a court of quarter sessions is to be treated* as if he had been convicted of that offence on indictment. For my part, I think that that is enough to enable us to say that in a case such as this the recorder has power to issue a bench warrant. Looking at the matter in this way—that the recorder is to be treated as if he has just tried the prisoner and as if the
- C prisoner has been convicted on indictment—it would follow that if, after the mid-day adjournment, the prisoner had absconded, the recorder, before sentencing him, could on these very words have had him brought up on a bench warrant. I think myself that the recorder had power to issue a bench warrant and that the order of mandamus should issue.

D STREATFEILD, J.: I agree.

DIPLOCK, J.: I agree.

- [LORD PARKER, C.J., then directed that mandamus should issue to the recorder, not to the assistant recorder, and indicated that reference to the prisoner “standing indicted” which appeared in the usual form both of an order for mandamus and of a bench warrant, could be suitably corrected to fit the purposes of the present case.]
- E

Order accordingly.

Solicitors: *Theodore Goddard & Co.*, agents for *Town clerk*, Cardiff (for the applicant).

[*Reported by* WENDY SHOCKETT, *Barrister-at-Law.*]

* I.e., for the purposes of s. 21 (2) (b) of the Act of 1948, which gives to the courts power to pass a sentence of preventive detention in the case of persons who are not less than thirty years of age and who are (a) convicted on indictment of an offence punishable with not less than two years' imprisonment; and (b) have been convicted on indictment on at least three previous occasions, in certain circumstances.

Re SAHAL'S WILL TRUSTS. ALLIANCE ASSURANCE CO., LTD.
v. ATTORNEY-GENERAL AND OTHERS.

[CHANCERY DIVISION (Danckwerts, J.), October 30, 1958.]

Charity—Children's home—Establishment—Gift to local authority of house to establish a children's home—Bequest of fund for benefit of children in home—Alternative purpose—Hostel for young soldiers, sailors, airmen or merchant seamen—Validity—Alternative gift to take effect should local authority discontinue children's home—Whether local authority must first establish children's home.

A testator by cl. 8 (i) of his will gave a dwelling-house to a local authority on trust "to use and maintain the same as a children's home" and expressed the desire that the home should be conducted along domestic and not along institutional lines "and without discrimination whatsoever on grounds of race religion colour or creed and that food prepared in accordance with the requirements of the Jewish religion shall always be available". By cl. 8 (iii) the testator bequeathed to the local authority £2,000 on trust to apply the income "for the benefit of such one or more of the children for the time being resident in the said house as they shall in their absolute discretion think fit". Clause 8 (iv) provided that "if at any time the said corporation shall discontinue the use of the said dwelling-house as a children's home as aforesaid the said dwelling-house shall be held upon trust to use and maintain the same as a hostel for young soldiers sailors airmen or merchant seamen or for poor aged and infirm people of the neighbourhood" and that the said £2,000 and the income therefrom "shall thereafter be applied in purchase of extra comforts for the residents in such hostel". On questions as to the validity of the gifts contained in cl. 8,

Held: (i) the gift in cl. 8 (i) for the founding of a children's home was charitable and valid, but that in cl. 8 (iii) of the £2,000 was not charitable and thus failed, since it contravened the rule against perpetuities.

Re Cole ([1958] 3 All E.R. 102) followed on the gift of the £2,000.

(ii) the gift of the house by cl. 8 (iv) for use as a hostel, etc., was a valid charitable gift and created a trust that was alternative to the trust created by cl. 8 (i); therefore, the local authority was entitled to accept the house for the purposes indicated in cl. 8 (iv) without first having used it for the purposes prescribed by cl. 8 (i).

(iii) the gift of the £2,000 fund in cl. 8 (iv) failed, because it was alternative to cl. 8 (iii) which contravened the rule against perpetuities.

[As to gifts for non-charitable public purposes, see 4 HALSBURY'S LAWS (3rd Edn.) 241, para. 522; and for cases on the subject, see 8 DIGEST (Repl.) 349-351, 296-311.]

Case referred to:

(1) *Re Cole, Westminster Bank, Ltd. v. Moore*, [1958] 3 All E.R. 102.

Adjourned Summons.

By his originating summons, dated May 13, 1958, the plaintiff, the trustee of the will of Isaac Felix Sahal, deceased, asked for the determination of the following questions (among others): (i) whether the trusts by cl. 8 declared concerning the house and money comprised therein were valid charitable trusts or whether the same failed for perpetuity or otherwise; (ii) whether the Salford Corporation would be at liberty to hold and apply the trust property in the manner provided by cl. 8 (iv) without having first held and applied the same in manner provided by cl. 8 (i).

- A *J. A. Wolfe* for the plaintiff, the trustee of the will of the testator.
Denys B. Buckley for the first defendant, the Attorney-General.
H. C. Easton for the second defendant, Salford Corporation.
J. W. Brunyate for the third defendant, the Solicitor-General.

B **DANCKWERTS, J.:** The testator's will was dated Nov. 23, 1953, and he died on May 5, 1956. I am concerned with the gift made by cl. 8 of the will. By cl. 8 (i) the testator devised and bequeathed his

C "dwelling-house known as 'Summerhill' Kersal in the City of Salford to the Salford Corporation Upon trust to use and maintain the same as a children's home to be known as 'Sahal House' And it is my desire that the said home shall be conducted as far as possible along domestic and not along institutional lines and without discrimination whatsoever on grounds of race religion colour or creed and that food prepared in accordance with the requirements of the Jewish religion shall always be available . . ."

D He further desired that a person employed by him should be allowed to reside there for a year. He bequeathed (by cl. 8 (ii)) all family portraits and photographs to the corporation, and expressed a desire that they should remain hanging on the walls if possible. By cl. 8 (iii) he bequeathed to the corporation

E "the sum of £2,000 Upon trust to invest the same as a fund to be known as the 'Sahal Welfare Fund' in or upon any of the investments hereby authorised and to apply the yearly income therefrom for the benefit of such one or more of the children for the time being resident in the said house as they shall in their absolute discretion think fit."

Clause 8 (iv) contains a proviso:

F "Provided always that if at any time the said corporation shall discontinue the use of the said dwelling-house as a children's home as aforesaid the said dwelling-house shall be held upon trust to use and maintain the same as a hostel for young soldiers sailors airmen or merchant seamen or for poor aged and infirm people of the neighbourhood and the said fund lastly hereinbefore bequeathed and the income therefrom shall thereafter be applied in purchase of extra comforts for the residents in such hostel."

G The testator disposed of his residuary estate on trust to charities to be selected by his trustee, and consequently there is a contest between the corporation and the charities.

H I should not have found any difficulty whatever in coming to a conclusion that the gift of the house and the gift of the fund were both charitable but for the decision of the Court of Appeal in *Re Cole* (1) ([1958] 3 All E.R. 102). There the defendant, the East Sussex County Council, maintained a house called Southdown House under the powers contained in the Children's Act, 1948, s. 15, which was a house for the accommodation of children committed to their care. A testator devised to his trustees two freehold houses on trust to apply the income therefrom

I "for the general benefit and general welfare of the children for the time being in Southdown House . . . as a small token of appreciation of the work carried on at such house."

The home which the testator desires to found in the present case is of a similar nature to that which was the subject of the bequest in *Re Cole* (1), because the testator's intention was to found a home which the Salford Corporation would carry on under the statutory powers which it had, i.e., to maintain therein

children who needed care and control due to their lack of amenities of a home or environment, or, through the failure of their parents, required to be assisted by being put in a home of this kind. In *Re Cole* (1) the majority of the Court of Appeal held that the gift of the houses for the purposes of creating a fund for the general benefit and general welfare of the children for the time being in the home was not a valid charitable trust. LORD EVERSHED, M.R., dissented. The reasons for the conclusion reached by the majority appear to be that the funds applied for the purpose of supplying any sort of amenity in these homes, without apparently being necessarily amenities essential to the welfare of the children, involved a perpetuity, and the purpose was not to be regarded as charitable. HARMAN, J., took the same view.

That decision is binding on me, and, if it covers the case which I have now to consider, I shall have to follow it; but the Court of Appeal plainly left open the case of a gift for the endowment or maintenance of a house of this kind, and I think also left out of their decision the question of a gift for the purpose of founding a home of this kind for these types of children. For that reason, the present case, as regards the general gift in cl. 8 (i) is not covered by the decision of the Court of Appeal. It appears to me on general grounds, which are to be found by an analogy from the preamble to the Statute of Elizabeth 1, 43 Eliz. 1 c. 4, that this is a gift for a class of person which the ambit of charity covers, and, therefore, the gift of the house for the purpose of the founding of a children's home by the Salford Corporation is a valid charitable gift*.

As regards the fund, however—the result is very unfortunate—I am bound by the terms of the decision of the Court of Appeal. I find myself unable to distinguish the terms of the gift contained in cl. 8 (iii) of the will from the terms of the gift which was considered by the Court of Appeal in *Re Cole* (1). If anything, it appears to me that taking the grounds on which the majority of the Court of Appeal came to the conclusion that they did, the present gift is more difficult to justify than the gift in *Re Cole* (1). Accordingly, the gift of the fund was not a valid charitable bequest.

I have now to consider the effect of the gift in cl. 8 (iv) of the will:

“Provided always that if at any time the said corporation shall discontinue the use of the said dwelling-house as a children's home as aforesaid the said dwelling-house shall be held upon trust to use and maintain the same as a hostel for young soldiers sailors airmen or merchant seamen or for poor aged and infirm people of the neighbourhood and the said fund lastly hereinbefore bequeathed and the income therefrom shall thereafter be applied in purchase of extra comforts for the residents in such hostel.”

Counsel for the Solicitor-General argued that the words should be construed in a strict manner so that this gift cannot take effect unless the corporation had first started the children's home for some period and then had discontinued it. I do not think that that is the right way to deal with the clause. It seems to me that what the testator is really doing is giving an alternative trust which is subject to the primary trust which he has directed in the first clause of his will. Therefore, it would be absurd that the corporation should be required to construct a home for perhaps a day and then abandon it, and then turn to the second alternative trust. It appears to me that it is unnecessary for the home ever to have been brought into being, and this trust is now valid. The two purposes, if they be purposes, and not one general purpose, seem to me to be charitable. They come within the general terms of the preamble to the Statute of Elizabeth 1, 43 Eliz. 1 c. 4, which will be found described in TYSSEN'S LAW OF CHARITABLE BEQUESTS (2nd Edn.) 28: “The list contained in the statute is as follows: (1) The relief of aged, impotent and poor people”. The testator has practically used the

* The declaration made pursuant to this decision was that the gifts contained in cl. 8 (i) and (ii), which latter related to family portraits in the house, were valid charitable trusts.

A same phrase as regards the second purpose, and that is the one which the corporation desires to carry out, "for poor aged and infirm people". "(2) The maintenance of sick and maimed soldiers and mariners". I emphasise the word "mariners", because there is a reference in cl. 8 (iv) of the testator's will to "merchant seamen".

B " (3) The maintenance of schools of learning, free schools, and scholars in universities. (4) The repair of bridges . . . (5) The education and preferment of orphans. (6) The relief, stock, or maintenance for houses of correction. (7) Marriages of poor maids. (8) The supportation, aid, and help of young tradesmen . . . (9) The relief or redemption of prisoners or captives. (10) The aid or ease of any poor inhabitants concerning payment of fifteens, setting out of soldiers, and other taxes."

C From the last it looks as if the object of the statute was the relief of poor inhabitants rather than soldiers, but the decisions have gone a long way from that interpretation in a number of cases in which what may be called service charities have been held to be objects of a charitable nature. The general result is that the purposes described by the testator in this clause of his will are valid charitable purposes. The position as regards the gift of the fund will not be D the same, because I have held, as a result of the decision of the Court of Appeal in *Re Cole* (1), that the fund is not held on charitable purposes in the first instance, and, therefore, that it suffers from the prohibition against perpetuities, and the alternative gift in cl. 8 (iv) will fail as well.

E Accordingly, it seems to me that the Salford Corporation is entitled to accept the gift of the house for the purposes of a home for aged and infirm people in the neighbourhood, but that the gift of the fund fails.

Declarations accordingly.

Solicitors: *Skelton & Co.*, Manchester (for the plaintiff); *Treasury Solicitor*; *Town clerk*, Salford.

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

F

MCDougall v. AEROMARINE OF EMSWORTH, LTD.

[QUEEN'S BENCH DIVISION (Diplock, J.), October 13, 14, 15, 16, 17, 1958.]

G *Building Contract—Ship—Property in craft and materials to pass to purchaser on payment of first instalment—Whether vesting defeasible.*

Sale of Goods—Rejection—Shipbuilding contract—Effect of clause that property should pass on payment of first instalment—Purchaser not bound to accept delivery if he was not reasonably satisfied with the performance of the craft on its trial run—Whether performance covered defective workmanship and materials and non-compliance with specification.

H *Sale of Goods—Time of performance—Shipbuilding contract—Yacht required for use in 1957 yachting season—Fixed delivery date but delivery on that date not guaranteed—Reasonable time—Whether a condition of the contract—Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 10 (1).*

I By a contract, dated Nov. 6, 1956, in a standard form sponsored by the Ship and Boat Builders National Federation it was agreed that the defendants should build a yacht for the plaintiff to specification. Clause 3 provided that the defendants should use their best endeavours to complete by May 1, 1957, but that, owing to the effect of delays and shortages, such delivery date could not be guaranteed. Provision was made for a trial run on completion of the yacht and the defendants were deemed to have completed construction at the conclusion of the trial run "provided that the performance of the craft during such trial run" was to the reasonable

satisfaction of the plaintiff. By cl. 8 of the contract it was provided that "the said craft together with all materials equipment fittings and machinery purchased by the [defendants] specifically for the construction thereof whether in their building yard workshops water or elsewhere shall become the absolute property of the [plaintiff] upon the first instalment being paid hereunder . . .". The first instalment was paid on Nov. 12, 1956, and subsequent instalments were paid as they became due. The trial run took place on June 3, 1957. The plaintiff then refused, however, to accept delivery of the yacht, objecting to the state of the seams of the topsides and gaps between planks. In fact the yacht was not at that time fit for the purpose for which it was required, by reason of the defective seams. Negotiations proceeded between the parties and certain re-splining work was done by the defendants, but at the beginning of September, 1957, the yacht was not fit for delivery and to make her so would have involved at least some four or five weeks' work. On Sept. 19, 1957, the plaintiff disclaimed any property in the yacht and demanded from the defendants repayment of the instalments, amounting to £1,735 15s. 6d., which he had paid. There was no evidence that when the first instalment was paid the construction of the yacht had started or that there were any materials or equipment etc. purchased by the defendants specifically for the construction of the yacht. Four-fifths of the 1957 yachting season were over by the beginning of September, 1957.

Held: (i) clause 8 of the contract did not deprive the plaintiff of the right to reject the yacht and if, in the circumstances of this contract, the clause passed the property in any materials to the purchaser it passed only a defeasible title, so that on a lawful rejection of the yacht the plaintiff could divest himself of any property therein.

Colonial Insurance Co. of New Zealand v. Adelaide Marine Insurance Co. ((1886), 12 App. Cas. 128) and opinion of LORD DUNDAS in *Nelson v. Chalmers (William) & Co., Ltd.* (1913 S.C. 441) applied.

(ii) the plaintiff was not bound to accept delivery if he reasonably was not satisfied with the performance of the yacht on its trial run, and for this purpose the standard of workmanship and material and the compliance of the craft with the specification were within the scope of the words "performance of the craft".

(iii) under the contract, on its true construction, the defendants were bound to deliver the yacht within a reasonable time after May 1, 1957, which time, in the circumstances, had expired by the beginning of September, 1957; and this obligation as to time of delivery was (applying s. 10 of the Sale of Goods Act, 1893) a condition of the contract.

(iv) the defendants having failed to deliver the yacht in accordance with the contract and the plaintiff having elected on Sept. 19, 1957, to rescind the contract, the plaintiff was entitled to recover the £1,735 15s. 6d. with interest and the amount of his surveyor's fees.

[Editorial Note.] As regards the passing of the property in an uncompleted ship in the course of construction, the present decision may be compared with *Re Blyth Shipbuilding & Dry Docks Co.* ([1926] Ch. 494). The contract in the present case excluded any warranty of fitness (see p. 438, letter D, post, and compare, e.g., *Cammell Laird & Co., Ltd. v. Manganese Bronze & Brass Co., Ltd.*, [1934] A.C. 402).

As to the transfer of property in materials used or to be used in the course of construction, see 3 HALSBURY'S LAWS (3rd Edn.) 503, para. 992 and p. 505, para. 1000; also 29 HALSBURY'S LAWS (2nd Edn.) 81, para. 93; and for cases

A on the passing of property in manufactured articles, see 39 DIGEST 497-501, 1146-1186.

As to a buyer's right of rejection of goods and its exclusion, see 29 HALSBURY'S LAWS (2nd Edn.) 148, 149, paras. 189, 190; and for cases on the subject, see 39 DIGEST 589, 590, 1898-1907.

B As to when stipulations as to time are conditions of contracts for the sale of goods, see 29 HALSBURY'S LAWS (2nd Edn.) 56, para. 69; and for cases on the subject, see 39 DIGEST 422, 547 et seq.]

Cases referred to:

- (1) *Reid v. Macbeth & Gray*, [1904] A.C. 223; 73 L.J.P.C. 57; 90 L.T. 422; 39 Digest 500, 1180.
- C (2) *Nelson v. Chalmers (William) & Co., Ltd.*, 1913 S.C. 441; 50 Sc. L.R. 364; [1913] 1 S.L.T. 190; 39 Digest 498, 1158 *ii*.
- (3) *Colonial Insurance Co. of New Zealand v. Adelaide Marine Insurance Co.*, (1886), 12 App. Cas. 128; 56 L.J.P.C. 19; 56 L.T. 173; 39 Digest 494, 1113.
- D (4) *Mediana (Owners) v. Comet (Owners, etc.)*, *The Mediana*, [1900] A.C. 113; 69 L.J.P.C. 35; 82 L.T. 95; 41 Digest 811, 6733.

Action.

On Nov. 6, 1956, the plaintiff, Mr. R. J. R. McDougall, agreed with the defendants, Aeromarine of Emsworth, Ltd., a firm of yacht builders and designers, that they should build for him a four-ton Thames measurement yacht of a standard type known as Tiger V Cruiser/Racer, with certain modifications. This yacht was required by the plaintiff for the 1957 yachting season and was for use for cruising and racing as the defendants knew. The contract was a printed agreement in standard form sponsored by the Ship and Boat Builders National Federation. Clause 1 of the contract provided that the hull of the yacht should be constructed in accordance with the defendants' standard specification for this type of vessel; cl. 2 provided that the plaintiff should pay for the craft the sum of £1,509 16s., payment to be made by instalments, the first on the signing of the agreement, the second on the laying of the keel, the third on completion of the planking, the fourth on installation of the engine and the fifth and final payment on completion of acceptance trials. The contract

F further provided:

G

"3. The builders will use their best endeavours to complete the construction and fitting out by May 1, 1957, but owing to the effect of delays and shortages such delivery date cannot be guaranteed.

H "5. Upon completion of the craft the builders will notify the purchaser in writing that the craft is ready for acceptance trials to be run and the purchaser or his authorised agent will present himself within twenty-eight days of the date of such notice to accompany the builders or their representative on a trial run of not less than one hour's duration . . .

I "6. The builders shall be deemed to have completed the construction and fitting out of the craft in accordance with the requirements of the annexed specification at the conclusion of the trial run provided that the performance of the craft during such trial run is to the reasonable satisfaction of the purchaser such satisfaction to be indicated by the signature of the purchaser to the memorandum endorsed on the back hereof.

"8. The said craft together with all materials equipment fittings and machinery purchased by the builders specifically for the construction thereof whether in their building yard workshops water or elsewhere shall become the absolute property of the purchaser upon the first instalment

being paid hereunder provided that the builders shall have a lien upon the craft materials equipment fittings and machinery for recovery of all sums due whether invoiced or not under the terms of this agreement or any variation or modification thereof.

"9. If any defective workmanship of the builders and/or materials shall be discovered in the hull or machinery sails or rigging (except as herein-after provided) of the craft within six months after the acceptance trials fair wear and tear excepted and notice in writing of the same be at once given to the builders the builders shall either repair and make good the same or pay to the purchaser a sum equal to the cost which they would have incurred in repairing or making good the same at their yard but the builders shall in no case be liable for detention consequential or other damages or for any defects in either original or substituted work which shall appear after the said period of six months nor shall the builders be liable for the failure of any proprietary articles or sub-contracted work which shall bear only the customary guarantee of the manufacturers where applicable nor shall the builders be responsible for any fault or failure consequent upon the design of the craft should such design not be the work of the builders or any naval architect appointed by them upon their own responsibility. Every guarantee and/or warranty and/or condition implied by statute or common law is expressly excluded from this contract.

"12. In the event of any instalment remaining unpaid for twenty-eight days after becoming due the builders shall be entitled to interest at the rate of five per cent. per annum and after a further period of twenty-eight days shall be at liberty to sell the craft as she may then lie or may complete and sell the craft after completion and any loss on such re-sale shall be made good by the purchaser.

"15. Delivery will be given at the builders' premises or on the water adjacent thereto."

The contract also contained an arbitration clause, providing for the submission of disputes to the arbitration of a single arbitrator and applying the Arbitration Act, 1950.

Various modifications in the design were agreed. One of the variations required by the plaintiff and agreed in December, 1956, in consideration of an extra charge, was that the topsides should be varnished instead of painted. This involved splining instead of caulking the seams (i.e., the filling material protecting the caulking cotton between the seams is, where the seams are splined, thin strips of wood, rather than a form of putty, so that the external surface presents the appearance of a continuous wooden surface). The decision to spline the seams was taken at a time when the construction of the yacht had progressed far enough for it to be then a more difficult operation than would have been the case if the decision had been taken earlier. The launching and acceptance trials took place on June 3, 1957. The plaintiff then pointed out to the defendants' principal representative, Captain Illingworth, that the vessel was making a considerable amount of water in the forecastle and that there were substantial gaps between the planks, through some of which daylight could be seen. Captain Illingworth assured him that the gaps would close up after the topsides had been wetted but the plaintiff was not asked to, and did not, sign the memorandum of satisfaction. On June 4, 1957, he wrote to the defendants, referring to their statement that the defects would cure themselves and adding:

"I am quite prepared to wait till say June 17 for this to come about. However if the seams do not close up by natural process, rendering the

- A boat completely watertight, I must make it clear that I expect that appropriate action will be taken by you and at your expense to ensure that the craft is made watertight."

On June 5, the defendants repeated their assurances that the defects would cure themselves and urged the plaintiff to accept the boat as having been delivered.

- B The plaintiff refused and on June 15, the defendants offered to re-spline any open seams without charge. The plaintiff agreed to this and ordered further modifications and July 11 was agreed on for the new launching.

At the end of June the plaintiff inspected the progress on the yacht and being dissatisfied with what he saw, decided to employ a surveyor, who examined it on July 8. On July 17 he reported to the plaintiff that it would be virtually

- C impossible to remedy the defects in the seams without replanking the whole of the topsides. He reported also a defect in two keel bolts and nuts which, though a serious defect, was easy to remedy. On July 27 this report was shown to the defendants and the plaintiff suggested that the defendants should either build him a new yacht or return his money. The defendants instructed their
D own surveyor, whose report they received on Aug. 2, and on Sept. 5 they wrote to the plaintiff:

"We have had Mungo (the yacht) surveyed by . . . In principle their report supports the claims made in your own report so far as the ballast keel bolts and topside seams are concerned. Under the circumstances
E this company is prepared to go ahead and rectify these two faults by replacing the necessary keel bolts and replanking the affected area to the satisfaction of the surveyors concerned, provided that you will confirm the owner's willingness to accept the yacht when these two conditions are satisfied."

- F Of this offer HIS LORDSHIP observed that it proposed a modification of the contract in that the work was to be done to the satisfaction of two surveyors, not to the reasonable satisfaction of the plaintiff. All the experts agreed (and the court found) that on July 11, 1957, the vessel in its then state was not fit for delivery, considering that question as one of merchantable quality or reasonable fitness for the purpose of use as a cruising and racing yacht, not in
G reference to the particular contract. On Sept. 19 the plaintiff's surveyor wrote to the defendants on his behalf rejecting the offer made in the defendants' letter of Sept. 5 and stating his opinion that the proposed repairs were impracticable and that as a result of the dismantling and reconstruction which would be necessary, the completed job, even if it could be done, would not be the equivalent of a new vessel. He reiterated the plaintiff's demand for his money
H back and disclaimed the plaintiff's property in the vessel.

On Oct. 1 the defendants wrote to give the plaintiff another two weeks to accept their offer of Sept. 5. This was again refused on behalf of the plaintiff on Oct. 18. On Oct. 30, 1957, the defendants wrote making two further alternative offers:

- I (a) "That we do the work suggested in the report of Mr. N. G. Duff (vide note attached) and Mr. McDougall then accepts the vessel and settles the outstanding sums due (We should be pleased, should he then wish it, to use our very best endeavours to sell the yacht for him)."
(b) "That Mr. McDougall accepts the vessel as she lies and settles the outstanding sums due less a special discount (which as a gesture of goodwill we would be glad to allow) of fifty guineas. Again in this case we will be glad subsequently to sell the vessel to the best advantage."

The note describing the work which the defendants were prepared to do read as follows: A

“Work to be carried out on the yacht Mungo to render her free from any possible complaint leading to non-acceptance (a) Two keel bolts to be replaced (b) topsides to be re-skinned in way of open seams.”

This offer was rejected by the plaintiff on Dec. 17, 1957, and on Apr. 25, 1958, B he issued a specially endorsed writ claiming, inter alia, £1,735 15s. 6d., being the sums he had paid under the contract for instalments of the original price and extras, and interest thereon at 8 per cent. p.a. from June 3, 1957, under the Law Reform (Miscellaneous Provisions) Act, 1934. The defendants alleged that the plaintiff had wrongfully repudiated the contract by refusing their offers of Sept. 5 C and Oct. 30 and counterclaimed for a balance of £180 17s. 7d. due in respect of the yacht and unpaid.

W. A. Fearnley-Whittingstall, Q.C., and *J. R. Bickford Smith* for the plaintiff.
R. D. Stewart-Brown, Q.C., and *C. R. Beddington* for the defendants.

DIPLOCK, J.: This is an action to recover moneys paid by the plaintiff D to the defendants in respect of the building of a yacht by the defendants, which the plaintiff refused to accept on delivery as not being in accordance with the contract. The contract was in the standard form sponsored by the Ship and Boat Builders National Federation. The case raises a number of points as to the true construction and legal effect of certain clauses in that contract, on which there does not appear to be any English authority. [HIS LORDSHIP stated the E facts and continued:] The plaintiff's claim for £1,735 15s. 6d. being a claim for money paid on a consideration which has wholly failed, it is necessary for him to say in order that he may succeed in his claim, that at the date of the issue of his writ he had no property in the vessel. He is then confronted at the outset with cl. 8 of the contract, which purports to vest in him the absolute property F in the craft and all equipment, materials, fittings and machinery purchased specifically for the construction thereof on payment of the first instalment. This was in fact paid on Nov. 12, 1956. Does the presence of this clause divest G him of his right to reject the yacht and disclaim any property in it if there be a breach of condition by the defendants, which in the case of an ordinary contract for the sale of goods would entitle him to do so? I say “a contract for the sale of goods” because it seems well settled by authority that although a ship-building contract is in form a contract for the construction of the vessel, it is in law a contract for the sale of goods; see, e.g., *Reid v. Macbeth & Gray* (1) ([1904] A.C. 223).

It is rather remarkable that although a clause of the nature of cl. 8 has been H common form in shipbuilding contracts for more than fifty years, there is no reported English decision as to its effect on the buyer's right of rejection. There is one Scots decision, *Nelson v. William Chalmers & Co., Ltd.* (2) (1913 S.C. 441), in which the matter has been discussed. There is, however, a danger in applying Scots decisions to English cases, since it appears that under Scots law property I in chattels passes only on delivery, except as otherwise provided by statute in the Sale of Goods Act, 1893. Consequently, it appears to me that the opinions of LORDS KINNEAR and MACKENZIE in the above-mentioned Scottish case turn largely on considerations peculiar to Scots law, and only the opinion of LORD DUNDAS deals with it on principles which are common to the laws of England and Scotland.

There is no evidence that by Nov. 12, 1956, on which date a receipt was given for the first instalment, the construction of the craft had been started, or that

A any equipment, materials, fittings or machinery had been purchased by the defendants specifically for the construction of the craft. There is, therefore, no evidence that any goods became the property of the plaintiff on the first instalment being paid, and it does not seem to me that on its true construction cl. 8 provides for the passing to the plaintiff of the property in the craft, if it came into being after that date, or in any equipment, materials, fittings, or machinery purchased by the defendants specifically for the construction of the craft after that date. The clause, which was no doubt designed for the protection of the purchaser in the event of the insolvency of the builder, thus seems to me to be quite inept for that purpose. Even if I were wrong in this and the clause were effective to transfer to the buyer the property in the craft as production proceeded and in the equipment, materials, etc. as they were purchased by the builders specifically for the construction of the craft, it does not follow that the property therein passed to the purchaser indefeasibly. It is not an unfamiliar conception in contracts for the sale of goods that the property should pass defeasibly. To this effect is the decision of the Privy Council in *Colonial Insurance Co. of New Zealand v. Adelaide Marine Insurance Co.* (3) ((1886), 12 App. Cas. 128), in which it was held that where delivery of goods is made by instalments under an entire contract, the property passes in each instalment on delivery and acceptance, but the buyer's right of property so acquired is defeasible at his option if the seller fails to deliver the total quantity contracted to be sold. In *Nelson v. William Chalmers & Co., Ltd.* (2) LORD DUNDAS applied the same principle to a shipbuilding contract containing a clause similar to cl. 8. Although neither of these decisions is binding on an English court, they seem to me to be right in principle and in accordance with common sense. I do not think that a clause providing for the transfer of property, whether qualified by the adjective "absolute" or not, in incomplete goods or their components of itself irrevocably deprives the buyer of any right to reject the goods when completed and to divest himself of his property therein. The question seems to me to depend on the construction of the contract as a whole, and to that I now turn.

The contract places on the seller the duty to complete the construction and fitting out of the craft and to deliver it to the buyer at the seller's premises or on the water adjacent thereto. These stipulations seem to me to be plainly conditions of the contract, and if the seller refuses or fails to complete, the buyer is entitled, in my view, to refuse to accept an incomplete craft, and if he does so, any right of property in the incomplete craft which he may have acquired under cl. 8 is determined and the property therein re-vests in the seller. Clause 6 of the contract defines what is meant by "completion of the craft" for the purposes of the present contract, that is, that the performance of the craft during the trial run is to be "to the reasonable satisfaction" of the buyer. The word "provided" in cl. 6 does not, as counsel for the defendants contends, introduce a proviso in the legal sense of that term, and the clause places on the buyer the obligation to sign the memorandum of satisfaction if he is, or ought as a reasonable man to be, satisfied by the craft's performance on its trial run. If he is not, and ought not as a reasonable man to be, so satisfied, he is not bound to accept delivery.

It is to be observed that the first sentence of cl. 9 gives him no remedy against the seller in respect of defects discovered before or during the acceptance trials, while the second sentence purports to exclude any guarantee, warranty or condition implied by statute or common law. For such defects, the buyer's only remedy is to refuse to accept delivery, on the ground that the sellers have not completed their contract.

Counsel for the plaintiff has argued that the second sentence in cl. 9 should be construed, in the context in which it appears, as limited to excluding conditions or warranties implied by statute or common law in respect of defects discovered after the trial run, and it is in the light of this contention that he claims that the buyer can rely on the breaches of the implied conditions as to merchantable quality and fitness for the purpose of use as a racing/cruising yacht in respect of the defects which were discovered at the time of the first trial run on June 3, 1957, and had not been adequately remedied when the craft was re-launched on July 11, 1957, although in the result there was no subsequent trial run. If I thought that the other clauses of the contract gave to the buyer no remedy in respect of defects discovered before or during the trial run, I should be tempted to give to the second sentence of cl. 9 the limited meaning contended for by counsel for the plaintiff, despite the plain words of that sentence that every guarantee and/or warranty and/or condition implied by statute or common law is expressly excluded from this contract, but as the contract read as a whole seems to me to give the buyer an adequate alternative remedy for such defects, I see no reason for cutting down the literal meaning of the words, despite the fact that they appear in a clause of which the first part deals only with defects discovered after the acceptance trials. I do not think, therefore, that the plaintiff could rely on any implied condition as to merchantable quality or fitness for a purpose.

He is, however, protected in a different manner by cl. 5 and 6. In my view, the effect of cl. 5 and 6 of the contract is to entitle the buyer to refuse delivery if he is not reasonably satisfied of the performance of the craft when tendered by the seller for delivery at the conclusion of the acceptance trials; and in the context of cl. 6 I construe the expression "performance" widely and as including the standard of workmanship and materials and the compliance of the craft with the specification. To read the words "performance of the craft" in a narrower sense would result in the seller being deemed to have fulfilled his contract even if the interior fittings were incomplete or different from those specified, so long as the vessel sailed well. It does not follow, however, that, because when the vessel is first tendered by the seller for acceptance trials the buyer is reasonably dissatisfied with her, he is entitled to treat the defects then existing as a breach of condition, so as to enable him to treat the contract as repudiated and to re-vest in the seller any property in the craft or any part thereof which may have been vested in the buyer by virtue of cl. 8. The buyer is entitled to refuse to accept delivery of the vessel in its existing state, but if the defect is one that can be remedied, and remedied within a time which will still enable the seller to deliver within the period of delivery permitted by the contract, the buyer is not, in my view, entitled to treat the contract as repudiated by the seller by reason of the existence of such defects at the time when the vessel is first tendered for acceptance.

It thus becomes relevant to decide what is the period for delivery permitted by the contract. Clause 3 states a specific date for delivery, namely, May 1, 1957, but expressly states that such delivery date cannot be guaranteed. A clause in this form, in my view, places on the seller a duty to deliver within a reasonable time of the specified date. What is a reasonable time from the specified date is a question of fact depending on all the circumstances of the case as they exist up to the time when delivery is or ought to be made. In my opinion, in the circumstances of the present case, which relates to the sale of a pleasure yacht built in accordance with the buyer's special requirements, for use by him in the 1957 yachting season, and where delays in completion after June 3, 1957, were due solely to the prior bad workmanship or the prior incorporation of defective materials by the defendants, a reasonable time had certainly expired by the

- A beginning of September, 1957, that is three months after June 3, and at a time when four-fifths of the 1957 yachting season had passed. Whether this stipulation as to time of delivery is a condition or a warranty depends, under s. 10 of the Sale of Goods Act, 1893, on the terms of the contract. In my view, the obligation to deliver within a reasonable time of May 1, 1957, is a condition. It was
- B conceded by counsel for the defendants that this was so as a general rule in mercantile transactions, but he contended that it did not apply to the sale of a vessel for use by the purchaser solely for his own pleasure, not for commercial use or for re-sale. I am not impressed by this argument. Where a purchaser buys a yacht for use for his own pleasure from the beginning of a particular yachting season, I think that it must, as a matter of common sense, be of the
- C essence of the contract that he should receive delivery in time to make substantial use of it during that season. It may be that he expects to use it also in subsequent seasons, but he cannot foretell whether he will be able to do so, and in any event it will have deteriorated in some degree by the time the next season comes round. Where, as was contemplated in this case, the yacht incorporates modifications to suit the buyer's personal taste, its value on sale by
- D him is likely to be less than the price which he paid. Furthermore, it does not seem to me that he can be adequately compensated in damages for any breach of the stipulation, since, although it was suggested in *Mediana (Owners) v. Comet (Owners, etc.)*, *The Mediana* (4) ([1900] A.C. 113) that real and not merely nominal damages may be given for the loss of a chattel which has amenity but not a commercial value, there is little assistance to be gained from the cases on
- E the question how such damages are to be assessed, and indeed it is impossible adequately to equate loss of some amenity or pleasure to pounds, shillings and pence. For these reasons, I am of opinion that it was a condition of the contract and not a mere warranty that the seller should deliver the yacht within a reasonable time of May 1, 1957, which time had, as I have held, expired by the beginning of September, 1957.
- F Applying these principles as to the construction and effect of the contract to the facts as I have found them, it follows that the plaintiff was entitled to refuse to accept delivery of the vessel when it was first tendered for acceptance on June 3, 1957. He was not then entitled and did not purport to treat the contract as repudiated by the defendants, but he was entitled to and did require the
- G defendants to complete their contract and to remedy the defects and to re-tender for acceptance within a reasonable time. The defendants then re-splined the topsides with the object of remedying the defects, but were, as I have found, unsuccessful in doing so. They did not formally tender the vessel for further acceptance trials, but on the facts formal tender for acceptance trials was, I
- H think, waived by both parties, since it was evident at the meeting on July 27 that the plaintiff would not be satisfied with the performance of the vessel at further acceptance trials, and on the facts that I have found, his dissatisfaction was reasonable. In these circumstances, I do not think that either party can rely on the absence of any formal acceptance trials at the end of July, and neither has sought to do so. Their legal position is the same as if there had been further formal acceptance trials on July 27, 1957, and the plaintiff had refused to accept
- I delivery of the vessel. He would have been entitled to do so. Furthermore, since the defects could not be remedied (if they could be remedied at all) in less than four or five weeks, and probably could not be remedied in less than two months, by which time the 1957 yachting season would be nearly finished or completely finished, the plaintiff was entitled to regard the contract as repudiated by the defendants on July 27, since by then it was impossible that it could be performed by them within a reasonable time. I am not satisfied on the facts, however, that he then elected to treat the contract as rescinded.

The defendants, therefore, had a *tempus poenitentiae* in which they could endeavour to continue to perform their contract, but despite their own surveyor's confirmation of the plaintiff's complaints, they took no steps whatever to remedy the defects and perform their contract but allowed five more of the remaining weeks of the yachting season to pass, until they wrote on Sept. 5 offering to remedy the defects, but only on terms which involved what I have already pointed out was a variation of the contract. The work which they offered to do could not in any event be completed until after the end of the yachting season. The defendants' failure to tender the yacht for delivery in accordance with the contract by Sept. 5 was itself a breach of condition which the plaintiff was entitled to treat as rescinding the contract. Their intimation, for that was what their offer amounted to, that they could not complete it before the end of the 1957 yachting season was a fortiori a wrongful repudiation of the contract by the defendants, as was their intimation that they would only complete the contract on terms different from those of the original contract. The plaintiff by his letter of Sept. 19 elected to treat the defendants' wrongful repudiation of the contract as rescinding it. I hold that, in all the circumstances of the case he was entitled to do so; but even if he were not, the defendants cannot rely on the plaintiff's purported rescission of the contract of Sept. 19 as a wrongful repudiation on his part of the contract, thus relieving them from any further obligation to perform it, because they did not accept his repudiation but continued to hold him to the contract; and on Oct. 30 they informed the plaintiff that they would insist either on completing the vessel on terms inconsistent with and less favourable to the plaintiff than those in the original contract or those that they had offered in their letter of Sept. 5, or on delivering the vessel in its defective state with an allowance of fifty guineas off the contract price. This was yet another wrongful repudiation by the defendants of the contract, which the plaintiff was entitled to and did accept. Such part of the property, if any, in the vessel or any portion thereof as had previously vested in him under cl. 8 of the contract accordingly re-vested then in the defendants.

I hold, therefore, that by Sept. 5, 1957, on the grounds that I have indicated, the plaintiff was entitled to treat the contract as rescinded by the defendants and elected to do so on Sept. 19. I hold, further, that by Oct. 30, 1957, he had (although I do not think that any were necessary) additional grounds for doing so, and that after these grounds were available, he reiterated his election to treat the contract as rescinded. The plaintiff is, accordingly, entitled to judgment for the sum of £1,735 15s. 6d. as money paid for a consideration that has wholly failed. He is also entitled to recover £88 4s. 7d. for surveyor's fees and other expenses and damages for the loss of use of the yacht during part at least of the 1957 season.

Although, as I have already said, there are passages in the speeches in *The Mediana* (4) which suggest (I respectfully think correctly) that more than nominal damages could be recoverable under this head, counsel for the plaintiff has abandoned any claim to more than nominal damages, which I accordingly fix at 40s., with some regret that I have been deprived of the pleasure of hearing what would have been an interesting argument how such damages ought to be assessed, but with great relief that I have not been obliged to try to assess them.

[HIS LORDSHIP, on the application of counsel for the plaintiff, awarded to the plaintiff interest on the £1,735 15s. 6d. at five per cent. per annum from June 3, 1957, that being the date from which counsel asked that interest should run, although certain instalments had been paid before then. The yacht having in

A fact been sold while the action was pending and the proceeds having been paid to the plaintiff, the interest payable was to be adjusted by arrangement between the parties to allow for the proceeds of such sale having been received by the plaintiff.]

Judgment for the plaintiff.

B Solicitors: *William A. Crump & Son* (for the plaintiff); *Howard Smith & Harston* (for the defendants).

[*Reported by E. COCKBURN MILLAR, Barrister-at-Law.*]

C

BISHOPWEARMOUTH (RECTOR AND CHURCHWARDENS) v. ADEY.

D [DURHAM CONSISTORY COURT (The Chancellor (E. Garth Moore, Esq.)), September 30, 1958.]

Ecclesiastical Law—Ornaments—Aumbry—Reservation of the Sacrament—Reservation sanctioned by the bishop—Reservation a necessity for the Communion of the sick—Faculty granted.

E An aumbry or cupboard is not an ornament and can properly be the subject of a faculty; and since reservation of the Sacrament is neither repugnant to the doctrine of the Church of England nor forbidden by law, it may be sanctioned by the bishop as part of the *jus liturgicum* and, if reservation is so sanctioned, the chancellor may grant lawful facilities for it, among which facilities is an aumbry (see p. 442, letter H, p. 447, letter D, post).

F A rector and churchwardens petitioned for an aumbry to be placed in the church for the express purpose of reservation of the Sacrament for Communion of the sick. The petition was supported by a majority of the parochial church council but was opposed by an opponent, who was on the electoral roll. The grounds of opposition were (i) that an aumbry would be illegal as being an ornament not authorised by the ornaments rubric and (ii) that it would be used in connexion with an illegal practice, namely, reservation of the Sacrament. The bishop had given permission for reservation and it was proved that in the parish in question reservation was a necessity for the Communion of the sick. It was not disputed that the architectural details were satisfactory.

H **Held:** a faculty would be granted since, for the reasons stated at letter E above, it was open to the chancellor to grant it, necessity for reservation had been established and the proposed aumbry was suitable.

Re St. Mary's, Tyne Dock ([1954] 2 All E.R. 339) and observations of CHANCELLOR WIGGLESWORTH in *Re Lapford* ([1954] 2 All E.R. at p. 315) followed.

I Observations on the doctrine of necessity in relation to the grant of faculties (see p. 446, letter E, to p. 447, letter C, post).

[As to reservation of the Sacrament in an aumbry, see 13 HALSBURY'S LAWS (3rd Edn.) 335, para. 765, note (g); and for cases on the subject, see 3rd Supp. to 19 DIGEST 2804c-2804e.]

Cases referred to:

(1) *Humphries v. Connor*, (1864), 17 I.C.L.R. 1; 43 Digest 439 n.

- (2) *Re Altofts, Parish of*, (July 4, 1941), Unreported. A
- (3) *Re Lapford*, [1954] 2 All E.R. 310; [1954] P. 416; *affd.*, *Court of Arches*, [1954] 3 All E.R. 484; [1955] P. 205; 3rd Digest Supp.
- (4) *Re St. Mary's, Tyne Dock*, [1954] 2 All E.R. 339; [1954] P. 369; 3rd Digest Supp.

Petition for a faculty. B

The facts appear in the learned Chancellor's judgment.

C. D. Renney, proctor for the opponent.

Mr. CHANCELLOR GARTH MOORE: This is a petition by the rector and churchwardens of the parish of St. Michael and All Angels, Bishopwearmouth, for an aumbry to be inserted into the south wall of the south chapel of the church, the express purpose for which it is sought being solely for the Communion of the sick. The petition is supported by the parochial church council, which consists of thirty-eight members, and, at the most relevant period, there was a resolution in favour of this petition, in which, in the presence of thirty-four members, twenty-four votes were cast in favour of the resolution and four were cast against the resolution. The architectural details are not the subject of dispute and, so far as they are concerned, I say at once that I am satisfied that they are aesthetically and architecturally satisfactory. The bishop has given his permission for reservation for the purpose of the Communion to the sick. The petition is opposed by Mr. Adey and his is the sole opposition in a parish of some six thousand to eight thousand persons, he himself not being a parishioner, but being on the electoral roll. He tells me in evidence that he could produce a number of opponents. In point of fact, he has produced only a document in the nature of an informal petition which is signed by fourteen persons, who, he says, are parishioners. He opposes the grant of a faculty on the limited grounds contained in his pleadings, namely, that the aumbry, if installed, would be illegal as being an ornament not authorised by the ornaments rubric and/or that it would be used or would be likely to be used in connexion with and/or ancillary to an illegal ceremony or practice, namely, the reservation of the Sacrament. He further alleges that the aumbry is unnecessary. In the normal course of events I should be not merely content but happy to deliver a very short judgment showing the conclusion at which I have arrived; but, in the light of the difficulties which tend to beset this and similar matters and in the light of the fact that I have no idea how far this case may go, it is incumbent on me to give my reasons in full. C D

First, I will deal with the argument that an aumbry is an illegal ornament. To my mind it is an abuse of language to describe an aumbry as an ornament at all. It is no more than a cupboard. It is in this case, though not in every case, a cupboard intended for the reception of the Blessed Sacrament; but it is still a cupboard. It is idle to argue that a cupboard is an illegal ornament; and it would not occur to anyone to argue that a cupboard at the west end of the church for the storing of brushes or dustpans was an illegal ornament. Its insertion might be opposed on other grounds; but certainly not on that ground. That is not the real gravamen of Mr. Adey's objection. His real objection is that he contends that reservation is unlawful and that, because reservation is unlawful, facilities for it (and an aumbry comes in that category) should not be granted. Now, as to that last point, it would normally follow that, if reservation were intrinsically unlawful, facilities for it should not be granted; but it does not necessarily follow. It is conceivable that, where reservation is taking place or is going to take place, in some circumstances it might be the court's duty to see that, despite the question of legality, proper safeguards for H I

- A the Sacrament are provided. The object of that would be, not to encourage illegality, but to mitigate what would otherwise be one of the bad effects of illegality. If one wants support for that proposition in the temporal law, one finds something of that line of reasoning in the *Orange Lily* case, otherwise known as *Humphries v. Connor* (1) ((1864), 17 I.C.L.R. 1). It may be that it was some such consideration as this which CHANCELLOR VAISEY had in mind
- B in *Re Altofts, Parish of* (2), which is referred to in *Re Lapford* (3) ([1954] 3 All E.R. 484), and it may even be this which the late Dean of the Arches had in mind in his decision in *Re Lapford* (3) itself. I am not sure; but, in any event, I myself would not lightly subscribe to a theory that the court can grant a faculty to facilitate an illegality, and I shall return to this point later on, when I am considering the judgment in *Re Lapford* (3).
- C It is, I think, desirable to begin from first principles, and in the first instance to consider the theological implications of reservation. Needless to say, I have no intention of going deeply today into all the facets of eucharistic doctrine. That would take far too long. I confine myself to the question whether reservation is theologically permissible within the Church of England, and, in saying
- D "theologically permissible", I am stating the matter with considerable moderation. First of all it is to be observed that a very large part of Christendom has reservation, both in the Western Church and in the Eastern Church. Secondly it is to be observed that there was a normal practice of reservation in England in pre-reformation times. It is all too frequently forgotten that pre-reformation canon law is still fully extant in the Church of England and in this realm, save
- E in so far as pre-reformation canon law has been expressly repealed or by necessary implication altered. Thirdly, there is no Anglican formula which in terms condemns reservation theologically. Fourthly, many branches of the Anglican Communion (as distinct from the Church of England) practise reservation. Fifthly, many churches in the Church of England have reservation. Sixthly,
- F in 1900 the two Archbishops after inquiry concluded, first, that reservation is doctrinally permissible and, secondly, that it is probably illegal. It is the first point with which I am at present concerned. It is, furthermore, a matter to which I should pay great attention, emanating, as it does, from so weighty a source on a point of doctrine; whereas on a matter of law I should naturally not be expected to give the same weight to the opinions of the Archbishops.
- G Seventhly, the practice of reservation was approved by the Church of England and found its way into the deposited Prayer Book of 1928 which was rejected by Parliament. In as much as the 1928 book was rejected by Parliament, it carries no legal weight whatever; but, inasmuch as the church gave the seal of her approval to reservation, it is to my mind a matter of great moment when one is considering the theological propriety of reservation. These seven matters
- H which I have mentioned provide very weighty material on which to base a conclusion that reservation is (to put it no higher) theologically permissible. The only theological argument within the framework of the Church of England against reservation of which I know is that which Mr. Renney has sought to draw from the Thirty-nine Articles. Article 28 states that the Sacrament of the Lord's Supper was not *by Christ's ordinance* reserved, carried about, lifted up, or worshipped. That is language carefully chosen at a time of great controversy. It is literally true that the Sacrament was not *by Christ's ordinance* reserved, and the language used is an echo of that used in the 25th article, which says that the Sacraments were not ordained of Christ to be gazed on or to be carried about. Again, that is literally true. But, if reliance is to be placed on the Thirty-nine Articles, they must be regarded in their entirety, and, in their entirety, they include the Sovereign's declaration which is, as it were, a preface to the Articles and which says more than once that the Articles are to be taken in their literal
- I

and grammatical sense. In their literal and grammatical sense these two articles do no more than state the obvious fact that by Christ's ordinance the Sacrament is not reserved, lifted up or carried about. Many, many other things which are perfectly lawful and perfectly proper have not been ordained by Our Lord. In my view the articles do not forbid reservation and I have no doubt whatever that from a theological angle the practice of reservation is doctrinally sound. So I turn to the further consideration of whether, although doctrinally sound, it may be contrary to law. A

By far the most formidable argument for the illegality of reservation is that contained in the rubric at the end of the service of Holy Communion in the Book of Common Prayer which directs that the consecrated elements shall not be carried out of the church but shall be reverently consumed. It is, I think, clear both from the immediate context of the words and also from all that we know of the history of the seventeenth century that the object of this rubric was to avoid profanation by the taking away of the consecrated elements and consuming them as though they were common food at an ordinary meal. The rubric was not, I think, aimed directly at reservation, which was not a common practice at the time of the rubric and was, therefore, probably not within the immediate contemplation of its authors. It might be argued with some force that, whatever be the object of the rubric, its wording is perfectly clear and should be taken as it stands. Or, is it the case that the Thirty-nine Articles are to be taken in their grammatical and literal sense but that the Book of Common Prayer is to be interpreted liberally? The Book of Common Prayer has statutory authority. It is a schedule to the Act of Uniformity, 1662. But there is often considerable confusion of thought by reason of this. Because the Book of Common Prayer has statutory authority it does not mean that it is itself a statute. Nor does it mean that it is to be interpreted as one would interpret the statute itself. It is the work of clergymen and its rubrics are directives written by clergymen for clergymen, in language which, for a directive, is clear enough, but which from a lawyer's angle leaves many loose ends and much to be desired and which one would not employ, for example, in the drafting of a conveyance. If examples are wanted, they abound throughout the Book of Common Prayer; witness the loose use of the words "minister" and "priest" in Morning Prayer and Evening Prayer; the absence of any authority for the antiphonal rendering of the psalms; the absence of any provision for hymns; the absence originally of any provision for a sermon after Morning or Evening Prayer; and the oft-quoted failure to direct the return of the infant after baptism. It is, in my view, of the highest importance to remember that the Book of Common Prayer is not itself a statute and ought not to be interpreted as though it were. Regarded in its true light as a directive, to be interpreted liberally according to the occasion, this rubric which we are now considering really does no more than forbid the profanation of the Sacrament. It takes no account, one way or the other, of its reservation for a purpose which was not present to the minds of the clerical authors of a devotional manual in the seventeenth century. In my judgment that rubric cannot possibly be interpreted as governing the present situation. B

Furthermore, I do not think that I am necessarily to assume that reservation would in this instance be effected at a public service; and it is to be observed that s. 13 of the Act of Uniformity, 1662, which enjoins the use of the form of service in the Book of Common Prayer does so only so far as the Sacraments, rites and ceremonies are *openly* used. There is one further matter to which I do not think reference has been made, but which I do not think I can ignore. The Act of C

- A Parliament known as the Act 1 Mary, Sess. 2, c. 3*, was reviewed as recently as the reign of George VI and it was then in part repealed. The part which was left on the statute book amongst other things makes provision for the protection of the Sacrament and its pyx or canopy. I think that there is at least some significance in the fact that an Act, reviewed by Parliament as recently as this, contains provision for the protection of the reserved Sacrament. This part of the Act being still extant and being deliberately left in force, it would appear that Parliament contemplates the fact of reservation.

- When one turns from basic principles and statutory provisions to decided cases, I agree with Mr. Renney that one need not look further for a review of the authorities than *Re Lapford* (3), except that one must also look at the decision in the first case of *St. Mary's, Tyne Dock* (4) ([1954] 2 All E.R. 339), which was heard in this Consistory Court by my predecessor and which, out of all the many cases referred to in *Re Lapford* (3), is the only case which is in strict law binding on me, and in which CHANCELLOR HYLTON FOSTER decided that an aumbry was not an illegal ornament and that there could be lawful reservation in an aumbry. If one is going to look (as one must) at *Re Lapford* (3), one should begin with the report of that case in the Consistory Court of Exeter ([1954] 2 All E.R. 310). I do not propose again to review the authorities which in that case was so fully reviewed by CHANCELLOR WIGGLESWORTH. It is to be observed that out of that large collection of cases there reviewed, while tabernacles have been condemned, there is no case where reservation in an aumbry with the permission of the bishop has been condemned and there are several reported cases and many, many unreported cases in which it has been allowed; and I myself in this diocese and in two other dioceses have often granted petitions for faculties for aumbries for the purpose of reservation. I say nothing today about tabernacles, for that issue is not before me; but, so far as reservation is concerned and so far as aumbries are concerned, I entirely adopt the view of CHANCELLOR WIGGLESWORTH ([1954] 2 All E.R. at p. 315), where he says:

- "I know of no authority which compels me to hold that reservation is unlawful when it takes place with the sanction of the bishop. I do not consider that it is forbidden by article 28 or by the rubric at the end of the Communion Service which was inserted for a wholly different reason, namely, for the prevention of the irreverent practices of Puritans. In my view, the Prayer Book neither forbids nor authorises reservation. It makes no provision for it. Where the bishop considers that something not provided for is needed, it is for the bishop to make provision in the exercise of that authority which he has in his diocese."

- In other words, where no other provision is made, the matter falls within the scope of the *jus liturgicum* and all that the chancellor is asked to do is to grant permission for a cupboard or aumbry. It is for the bishop to allow or forbid, now and hereafter, the use of the cupboard for reservation.

I have now stated my own views which, on this point, entirely accord with the views of CHANCELLOR WIGGLESWORTH as expressed in *Re Lapford* (3). I

- * This statute was given the short title "The Brawling Act, 1553" by the Statute Law Revision Act, 1948, s. 5 and Sch. 2. Section 1 of the Brawling Act, 1553, includes the words "or if anye person . . . shall contemptuouslye unlawfullye or maliciouslie of their own power or auctoritie . . . unreverentlye handle . . . the most blessed comfortable and holy sacrament of the body and bloude of our Saviour Jesus Christ, comonly called the Sacrament of the Aulter, being or that shall bee in anye church or chappell or in any other decent place, or the pike or canapie wherein the same sacrament is or shall bee . . . that then every suche offendour . . . shall bee . . . arrested . . ." The section then provided for the punishment of the offender if the offence were proved. See 7 HALSBURY'S STATUTES (2nd Edn.) 1187, 1188.

do not, of course, overlook the fact that that case was the subject of an appeal to the Court of Arches and that the judgment of the late Dean, SIR PHILIP BAKER-WILBRAHAM, is reported ([1954] 3 All E.R. 484). Strictly speaking, that judgment is not binding on me in the Northern Province; but it is, of course, one to which I pay very great deference and which I consider that I ought to follow, unless there is a compelling reason to the contrary. I confess that I do not wholly understand that judgment. So far as I do understand it, I propose to follow it. Its plain wording would seem to me to indicate two points, namely, (i) that reservation is illegal; but (ii) that, since Parliament in 1928 refused to make it lawful, it is proper for courts of law to grant facilities to enable it to take place. That is something which is so wholly at variance with what I understand to be the duty of a court, that I can only suppose that for some reason or another, I have misunderstood the learned Dean. What, however, is clear beyond doubt is that, according to the learned Dean, it is proper for a consistory court to grant a faculty for an aumbry when the bishop has sanctioned reservation. If then I do grant a faculty in this case (whatever be the learned Dean's true meaning and by whatever route he arrived at his conclusion) I shall at least be doing what he says that it is proper for me to do. I shall also be doing what, in similar circumstances, I have so often done before and what has been done so often by my brother chancellors in their dioceses. I shall, too, be following the one precedent binding on me in this court, namely, the decision of CHANCELLOR HYLTON FOSTER in *St. Mary's, Tyne Dock* (4).

I have said that I would not lightly subscribe to a theory that it could be proper to grant facilities for what is illegal. I do feel bound, however, to draw attention in the present case (I have already done so during argument) to the doctrine of necessity, a doctrine which has its place in the common law of England, though its limits have never been exactly defined. It has even an older place in the *jus commune* of the church and is, if anything, there more firmly entrenched. Its relevance to the present case is this. The incumbent has given evidence (which I do not think has been challenged) about the number of occasions on which in his parish he or his assistant curates, of whom there are two, are called on to administer Holy Communion to the sick. The number varies from week to week. There are generally from fifteen to thirty, with a considerably larger number at the greater festivals. Now in 1662, when the Act of Uniformity was passed and the Book of Common Prayer received its statutory authority, there was a population in this country of something like five and a half million. Statistics are uncertain, but according to Gregory King's Tables, in the seventeenth century there were at least ten thousand clergymen. It may be there were many more; but there were at least ten thousand. This means that there was at least one clergyman for every five hundred persons. In the twentieth century the population is something like forty-five million, and, although there are no accurate statistics available, there are at most eighteen thousand clergymen of the Church of England to cater for that forty-five million. When one looks at the 1931 census one finds only thirty-two thousand four hundred and seventy-nine ministers of *all* denominations for a population of forty-three million. Let us keep to the figure of the seventeenth century, which is certainly approximately correct, of one clergyman for every five hundred persons, and compare that today where it is no uncommon thing to find a single parish priest for a population of something like twenty thousand. Or take the present case, where there are three available priests for a population of some six thousand or more. The provision in the Book of Common Prayer in the seventeenth century for a special service for the Communion of the sick could well have been practicable as a normal practice in the seventeenth century. Today, it is often quite out of the question for the sick to have a

- A separate sick bed service for the celebration of the Holy Communion for each person. Quite apart from the question of the time involved, it would be spiritually very undesirable for a parish priest to communicate (as communicate he must if he actually celebrates at the sick-bed) as often as the needs of today would dictate were he to provide a separate Service of Holy Communion for every sick person. I say nothing whatever today about the strong theological arguments in favour of communicating the sick from the Sacrament consecrated at the parish Eucharist, rather than from the Sacrament consecrated at what is in effect a private service. At the moment I am considering only the practical problem. For practical reasons a separate celebration at each sick-bed is often impossible, and, in the present case, I am satisfied that, if the sick are to receive the Holy Communion, reservation is a necessity, not as strikingly as in many cases that I have known, but, nevertheless, it is a real necessity. That, in my judgment, would be a sufficient reason in law to sanction facilities for reservation in an aumbry, and, as I have indicated, this may be the type of consideration which was referred to by the Dean of the Arches in *Re Lapford* (3) and by CHANCELLOR VAISEY in the *Altofts* case (2).
- D I, therefore, hold (i) that an aumbry or cupboard can properly be the subject of a faculty; (ii) that reservation is not repugnant to the doctrine of the Church of England; (iii) that neither in the Book of Common Prayer nor anywhere else is it forbidden by law; (iv) that, accordingly, it may be sanctioned by the bishop as part of the *jus liturgicum*; (v) that, that being so, it is open to the chancellor to grant lawful facilities for it and, among these lawful facilities, is an aumbry; (vi) that in the present case the necessity for reservation for the Communion of the sick has been established; and (vii) that the proposed conditions are satisfactory from an aesthetic and architectural point of view. I, therefore, decree that a faculty shall issue as prayed; but there are still two further matters which require attention. By an oversight the petitioners have not as yet petitioned for any vessel or vessels for the purpose of reservation and to decree an aumbry without decreeing also the appropriate vessels would nullify the effect of the proceedings. It could be argued, of course, that these could be the subject of a further petition, but a further petition would cost more money, and I accordingly give leave to the petitioners to amend the petition to pray therein for the appropriate vessels, when the petitioners have decided more precisely the manner in which reservation is in the present case to be carried out. The issue of the faculty will be held up for that amendment to be made, and furthermore, I shall have to make the usual condition about the completion of the work within a certain time, and so, unless I am told of a reason to the contrary, it will be a term that the work be completed within three months or such further time as the court may allow. Then there is the question of a white light. I appreciate that the incumbent has deliberately refrained from asking for a light with the express object of giving as little offence to the party opponent as possible; but I feel a little doubtful about the propriety of reserving without giving the customary indication of the presence of the Blessed Sacrament. It is well that persons who come into the church should know that the Blessed Sacrament is in fact reserved therein. I propose to leave this to the personal discretion of the incumbent; and, since he already has leave to amend the petition for the introduction of the appropriate vessel or vessels, if on reflection and after consultation with the bishop he wishes also to amend so as to pray for the grant of permission for a light on the same faculty, he may do so.

Finally we come to the question of costs; and, unless Mr. Renney has any argument to present in regard to this matter, since the *prima facie* rule is that costs follow the event, I propose to order that the costs of these proceedings

be paid by the party opponent. I do not know whether the petitioners will wish to enforce the order for costs if made, but, *prima facie*, they are entitled to the order, and I think that the order should be there so that the petitioners may avail themselves of it or not, as they wish.

Proctors: *C. R. Walker & Renney*, Sunderland (for the opponent).

[Reported by A. T. HOOLAHAN, Esq., *Barrister-at-Law.*] B

Re THE AGREEMENT BETWEEN THE MEMBERS OF THE CHEMISTS' FEDERATION.

[RESTRICTIVE PRACTICES COURT (Devlin, J., Upjohn, J., Lord Cameron, Sir Godfrey Mitchell, Sir Stanford Cooper, Mr. W. L. Heywood and Mr. W. G. Campbell), October 6, 7, 8, 9, 10, 13, 14, November 3, 1958.] D

Restrictive Trade Practices—Reference—Chemists' Federation—Restriction on sale of medicines except through retail chemists—Code of Standards worked by federation—Another code of advertising standards in existence—Whether restriction "reasonably necessary"—Whether removal of restriction would deny public substantial benefit—Restrictive Trade Practices Act, 1956 (4 & 5 Eliz. 2 c. 68), s. 21 (1) (a), (b). E

Restrictive Trade Practices—Court—Practice—Evidence of opinion—Interlocutory proceedings—Exchange of statements—Particulars—Discovery—Documentary evidence—Restrictive Practices Court Rules, 1957 (S.I. 1957 No. 603), r. 36 (b), (g), r. 41, r. 54, r. 55.

Restrictive Trade Practices—Injunction—Whether injunction granted as of course where restrictions declared contrary to public interest—Restrictive Trade Practices Act, 1956 (4 & 5 Eliz. 2 c. 68), s. 20 (3). F

A federation of manufacturers, wholesalers and retailers of medical and pharmaceutical products, registered as a trade union, was formed in 1935 with a view to protecting chemists against competition that they considered to be unfair. The main object of the federation was to promote the policy that proprietary medicines manufactured by manufacturer members should be sold to the general public only through premises registered under s. 12 of the Pharmacy and Poisons Act, 1933, or by or under the control of registered pharmacists, i.e., retail chemists. Statutory prohibitions, applicable to such proprietary medicines as contained dangerous drugs, restricted the sale of about one quarter of all proprietary medicines. The remainder were not subject to statutory restriction and could lawfully be sold through about 15,000 chemists' shops in England and Wales or through 200,000 other retailers, such as drug stores or grocery stores. Within the federation every medicine produced by a manufacturer member had to be offered by that member to be put on the federation's "C.F. list"; no product on that list might be supplied except to retail chemists (whether members of the federation or not) or to wholesalers who would undertake to supply only to retail chemists. There were 122 manufacturer members of the federation out of a total of 356 manufacturers; and the proprietary medicines on the C.F. list numbered 4,000 out of 9,000 products, the sale of those on that list amounting to about one-third of the sale of all proprietary medicines. In 1941 the federation established a standards committee to work a code of standards under which medicines were classified in Class A (which were medicines supplied mainly on doctors' prescriptions and not the subject

- A of lay advertising by manufacturers) and Class B (which were medicines that were household remedies for direct sales to the public and might be the subject of lay advertising); Class B was the more important and comprised about two-thirds of the products of the C.F. list. After 1941 no new product was placed on the C.F. list unless it was passed by the standards committee of the federation. In 1945 a code of standards relating to advertising, substantially the same as a code formerly issued by another association, was accepted and was thereafter enforced in relation to newspaper advertisements (by the newspaper proprietors) and in relation to advertising media other than newspapers. This code did not extend to Class A medicines. There was some evidence that without the restrictions retail chemists in country districts might be forced out of business. There was no evidence of any injury
- C having been caused to members of the public by the sale of proprietary medicines through retailers other than chemists. On a reference by the Registrar of Restrictive Trading Agreements under s. 20 (2) (a) and s. 20 (1)* of the Restrictive Trade Practices Act, 1956, the federation sought to support its restrictions under s. 21 (1) (a)*, contending that it was not safe for unqualified persons to sell medicines, and under s. 21 (1) (b)*, contending
- D that the removal of the restrictions would deny the public substantial benefit from the work of the standards committee or by forcing out of business country chemists.

Held: (i) the federation had not satisfied the court under s. 21 of the Restrictive Trade Practices Act, 1956, either—

- E (a) that the restrictions were reasonably necessary (within s. 21 (1) (a)) to protect the public, because the risk of injury, in the absence of the restrictions, was too slight to justify them and, if the risk were greater than the court found, the restrictions afforded no real protection against it (see p. 459, letter I, post; dictum of BUCKLEY, J., in *Stanford v. Roberts* ([1901] 1 Ch. at p. 444), on the meaning of “reasonably necessary”, applied); or
- F (b) that the removal of the restrictions would deny the public as purchasers substantial benefits (within s. 21 (1) (b)) because, as regards the Class B

* Section 20 (1) of the Restrictive Trade Practices Act, 1956, provides: “(1) The court shall have jurisdiction, on application made in accordance with this section in respect of any agreement of which particulars are for the time being registered under this Part of this Act, to declare whether or not any restrictions by virtue of which this Part of this Act applies to the agreement (other than restrictions in respect of matters described in paras. (b) to (d) of sub-s. (8) of s. 8 of this Act) are contrary to the public interest.

G “(2) An application to the court under the foregoing sub-section may be made—(a) in any case, by the registrar . . .

- “ (3) Where any such restrictions are found by the court to be contrary to the public interest, the agreement shall be void in respect of those restrictions; and . . . the court may . . . make such order as appears to the court to be proper for restraining all or any of the persons party to the agreement . . . (a) from giving effect to . . .
- H the agreement in respect of those restrictions . . . ”

I Section 21, so far as relevant, provides: “(1) For the purposes of any proceedings before the court under the last foregoing section, a restriction accepted in pursuance of any agreement shall be deemed to be contrary to the public interest unless the court is satisfied of any one or more of the following circumstances, that is to say—(a) that the restriction is reasonably necessary, having regard to the character of the goods to which it applies, to protect the public against injury (whether to persons or to premises) in connexion with the consumption, installation or use of those goods; (b) that the removal of the restriction would deny to the public as purchasers, consumers or users of any goods other specific and substantial benefits or advantages enjoyed or likely to be enjoyed by them as such, whether by virtue of the restriction itself or of any arrangements or operations resulting therefrom . . . and is further satisfied (in any such case) that the restriction is not unreasonable having regard to the balance between those circumstances and any detriment to the public or to persons not parties to the agreement (being purchasers, consumers or users of goods produced or sold by such parties, or persons engaged or seeking to become engaged in the trade or business of selling such goods or of producing or selling similar goods) resulting or likely to result from the operation of the restriction.”

products, the work of the federation's standards committee was unnecessary in view of the existence of the 1945 code regulating advertising, and, as regards Class A products, since these passed through the hands of doctors or were used in hospitals, the code of standards was not of substantial benefit to the public (see p. 461, letters B to D, post); further, there was insufficient evidence that, if the restrictions were removed, chemists in country districts would be forced out of business, and

(c) in either case the absence of the restrictions would not be of such detriment to the public as to make it not unreasonable (within the final provision of s. 21 (1)) that the restrictions should operate (see p. 460, letters A and B, and p. 461, letter D, post).

(ii) the restrictions were, therefore, deemed to be contrary to the public interest within s. 20 (1) and the court would so declare, stating in the declaration which rules of the federation were rendered void, and including (a) the provision therein that manufacturers should offer medicines for inclusion in the C.F. list, because, though that did not directly relate to sale, it was ancillary to the general restriction, and (b) a provision* binding retail chemists that no product should be sold except in the package in which a manufacturer had packed it, because the provision did not substantially benefit the public and thus did not satisfy s. 21 (see pp. 462, 463, post).

(iii) an injunction in pursuance of s. 20 (3) of the Act of 1956† was a discretionary remedy and would not be granted as of course; in the present case, an injunction would not be granted but the registrar, if dissatisfied with the course pursued by the federation, might apply subsequently for the grant of an injunction on cause shown (see pp. 463, 464, post).

Observations on whether witnesses having trade experience gave expert evidence when giving evidence of opinion and on the admissibility of such evidence under r. 55 of the Restrictive Practices Court Rules, 1957 (see p. 462, letters B to E, post).

Observations and decisions on interlocutory proceedings (see p. 453, letter F, to p. 455, letter H, post).

[For the Restrictive Trade Practices Act, 1956, s. 20 and s. 21, see 36 HALSBURY'S STATUTES (2nd Edn.) 952-955.]

Cases referred to:

- (1) *Stanford v. Roberts*, [1901] 1 Ch. 440; 83 L.T. 756; sub nom. *Re Stanford*, *Stanford v. Roberts*, 70 L.J.Ch. 203; 30 Digest (Repl.) 324, 141.
- (2) *Glasgow Corpn. v. Muir*, [1943] 2 All E.R. 44; [1943] A.C. 448; 112 L.J.P.C. 1; 169 L.T. 53; 107 J.P. 140; 2nd Digest Supp.
- (3) *Bolton v. Stone*, [1951] 1 All E.R. 1078; [1951] A.C. 850; 2nd Digest Supp.

Reference.

Pursuant to the Restrictive Trade Practices Act, 1956, s. 20 (2) (a), the Registrar of Restrictive Trading Agreements referred to the Restrictive Practices Court the Agreement between the members of the Chemists' Federation and contained in the Constitution and Rules of the federation, the list of members, the handbook of the federation, and the C.F. Code of Standards for Proprietary Medical Products compiled and adopted by the federation. By r. 2 of the Constitution and Rules, the objects of the federation were:—(i) to encourage and promote the policy that the proprietary medicines (i.e., medicinal preparations and surgical dressings dealt in or proposed to be dealt in by retail chemists) which were manufactured by the federation's manufacturer members should be sold to the general public only from registered premises by or under the personal control of registered pharmacists, i.e., retail chemists; (ii) to take lawful steps to ensure that such medicines

* For the agreed statement of this point, see head (xi) at p. 452, letter H, post.

† See footnote, p. 449, letter H, ante.

- A were sold to the public only as aforesaid; (iii) to establish and administer for the protection of the public standards governing the quality, presentation, advertisement and sale of such medicines; and (iv) to advise and assist members on matters of common interest and to do things for their benefit and/or of service to the public. By r. 3, membership consisted of the following classes of members:—
- B (i) manufacturers of proprietary medicinal preparations and proprietary surgical dressings who had agreed to conform to the rules of the federation and whose products had been accepted for inclusion in the C.F. list; (ii) wholesale distributors of proprietary medicinal preparations and proprietary surgical dressings who had agreed to conform to the rules of the federation and whose names were included in the list of wholesalers; and (iii) retail chemists who were vendors of proprietary medicinal preparations and proprietary surgical dressings and who
- C were carrying on business as retail chemists from premises registered under the Pharmacy and Poisons Act, 1933, s. 12.

- Members were elected by the council of the federation and paid annual subscriptions. Under r. 32 (i) the council from time to time compiled, published or altered a list or lists of members either sectionally or as a whole and a list or
- D lists of C.F. products, and such list or lists were referred to collectively as "the C.F. List". Under r. 32 (ii) the council also compiled and maintained a code of standards for proprietary medicinal preparations and proprietary surgical dressings. By r. 32 (iii), to be eligible for inclusion in the C.F. list, a product had to be a pharmaceutical or medical preparation of a proprietary character (including surgical dressings) intended for the prevention or alleviation of
- E human ailments and approved by the council. In addition, evidence had to be given as to manufacturing facilities, quality and presentation, suitability for purposes and claims made in respect of it, advertising and marketing policy and reasonable relationship between cost and retail price, and in all other ways complying with the C.F. code of standards. By r. 33, no product was to be included in or remain on the C.F. list unless the proprietor (or his duly accredited agent)
- F was for the time being a manufacturer member. By r. 34, subject to the rules of the federation, the council might select the products to be published in the C.F. list and might at any time remove any product from the list. By r. 36, C.F. products might be sold or supplied as stated in r. 38, r. 39 and r. 40, provided that the C.F. products should not be supplied in any way by sale, exchange, barter, gift or otherwise to any person who contravened any of the conditions in force under these rules. Rule 37 provided that to secure adequate distribution of
- G C.F. products to retail chemists the council should from time to time compile, publish or revise a list or lists of wholesalers who in the opinion of the council (a) were of good standing and reputation; (b) were engaged wholly or mainly in wholesale trading with such classes of persons as were entitled to receive C.F. products; (c) stocked a substantial range of products and possessed sufficient facilities for and carried on a bona fide wholesale trade with such classes of
- H persons as were entitled to receive C.F. products for resale or professional use. The terms of r. 38, r. 39, and r. 40 appear sufficiently from the agreed statement of restrictions hereinafter set out. For the purposes of the reference the following statement of the restrictions was agreed—

- I As regards manufacturers: (i) (by r. 38 (i)) Not to supply C.F. products to persons other than wholesale members on the list of approved C.F. wholesalers, persons who carry on the business of a retail chemist in accordance with the Pharmacy and Poisons Acts or any Act amending the same or substituted therefor and who sell products by retail to the public from premises (or a section of premises) which are registered under those Acts whether or not they are members of the federation, registered medical or dental practitioners or other professional persons who buy for professional purposes only, hospitals and approved nursing institutions, who buy for use and not for resale, unless authorised in writing by

the federation. (ii) (by r. 38 (ii)) Not to supply C.F. products to agents other than members of the federation without the previous consent of the council of the federation to the appointment which consent shall not be unreasonably withheld. Not to supply C.F. products to agents other than members of the federation except on or subject to the following terms or conditions:—that the agent shall sell and distribute such products by wholesale only; that the agent and the manufacturer shall not unreasonably withhold such products from C.F. wholesalers; that, as regards such products in his possession both before and after the termination of his agency, the agent will observe, perform and comply with all rules by which the manufacturer is bound; that his appointment shall be subject to cancellation on the ground of any breach of rules and be cancelled if so required by the council. (iii) (by r. 38 (iii)) Not to supply C.F. products to wholesaler members or retail chemists except on a condition of sale that the conditions relating to resale provided by r. 36*, r. 37, r. 39, r. 40 and r. 41 are observed. (iv) (by r. 38 (iv)) Not to supply C.F. products in quantities which are excessive having regard to the reasonable requirements of the purchaser's business. (v) (by r. 38 (v)) Not to supply any products eligible for inclusion in the C.F. list without first offering the said products for inclusion in the C.F. list.

As regards wholesalers: (vi) (by r. 39 (i) and (ii)) Not to supply C.F. products to persons other than persons who carry on the business of a retail chemist in accordance with the Pharmacy and Poisons Acts or any Act amending the same or substituted therefor and who sell the products by retail to the public from premises (or a section of premises) which are registered under those Acts whether or not they are members of the federation, registered medical or dental practitioners or other professional persons who buy for professional purposes only, hospitals and approved nursing institutions who buy for use and not for resale, and wholesale and manufacturer members in certain circumstances, except with the written consent of the federation or as permitted by the council. (vii) (by r. 39 (iii)) Not to supply C.F. products except in a manner which assists the federation's policy of selling proprietary medicinal preparations and proprietary surgical dressings through retail chemists (N.B. The like restrictions as are set out against r. 39 (i) and (ii) are to be inferred from this rule). (viii) (by r. 39 (i) (d)) Not to supply C.F. products to retail chemists except on condition that the conditions relating to resale in r. 36 and r. 40 are observed.

As regards retailer chemists: (ix) (by r. 40 (i), Points for Guidance No. 4†) Not to sell, supply, exchange, barter, any C.F. product or proprietary medicinal product manufactured by the retailer or on his behalf except by retail to the public; or to hospitals, medical or approved allied professional persons for professional use only. (x) (by r. 40 (ii)) Not to acquire C.F. products from persons other than the proprietor thereof or a wholesaler member whose name appears on a list of approved wholesalers compiled by the council or a manufacturer member acting as a wholesaler. (xi) (by r. 40 (iii), Points for Guidance No. 3) Not to sell any C.F. product otherwise than in the box, bottle, container, etc., in which the product has been packed for sale to the public by the proprietor except with the consent of the proprietor or when it is dispensed.

As regards all members: (xii) (by r. 36) Not to supply C.F. products in any way by sale, exchange, barter, gift or otherwise to any person who contravenes any of the conditions in force under the rules; (by r. 41 (ii)) not during such period as the council may prescribe to supply or acquire C.F. products to or from any person to or from whom the council has directed that such products shall not be sold or bought.

The following statement of matters which the registrar contended were restrictions, but which were not admitted by the federation to be such, was

* For the provisions of r. 36 and r. 37, see p. 451, letters F to H, ante.

† The Points for Guidance of retailer members, were paragraphs on a page in the handbook of the Chemists' Federation.

- A included in the agreed statement: (xiii) (by r. 40 (iv), Points for Guidance Nos. 1 and 4) Not to supply other C.F. products or proprietary medicinal products manufactured by the retailer or on his behalf when it is open to the retailer to elect whether to supply a C.F. or a similar non C.F. product. (xiv) (by r. 40 (iv), Points for Guidance Nos. 1 and 4) Not to try to sell non C.F. proprietary medicinal preparations or surgical dressings in competition with C.F. proprietary medicinal preparations or surgical dressings. (xv) (by r. 40 (iv), Points for Guidance Nos. 1 and 4) Not to try to promote the sale of non C.F. proprietary medicinal preparations in competition with C.F. proprietary medicinal preparations or surgical dressings. (xvi) (by Points for Guidance No. 2) Not to acquire non C.F. proprietary medicines, non C.F. pharmaceutical specialities or other non C.F. products on or subject to terms or conditions requiring window or counter display other than the display of one of each size (up to a maximum of three) of a non C.F. proprietary medicine (with a price ticket) in a composite display of similar products. (xvii) (by Points for Guidance No. 2) Not to acquire non C.F. proprietary medicines on or subject to terms or conditions requiring the display of show material relating thereto. (xviii) (by Points for Guidance Nos. 1 and 2, and r. 40 (iv)) Not to acquire non C.F. proprietary medicinal preparations or surgical dressings on terms and conditions prohibiting the retailer from discriminating against those products in favour of products on the C.F. list. (xix) (by Points for Guidance Nos. 1 and 2, and r. 40 (iv)) Not to acquire non C.F. proprietary medicinal preparations or surgical dressings on terms and conditions requiring the retailer to give his personal recommendations to non C.F. goods where they compete with goods on the C.F. list. (xx) (by Points for Guidance Nos. 1 and 2, and r. 40 (iv)) Not to acquire non C.F. proprietary medicinal preparations and surgical dressings on terms and conditions requiring the retailer not to use his best endeavours to promote the sale of products on the C.F. list in preference to non C.F. products (N.B. the ambit of the phrase "C.F. Products" is extended by Points for Guidance No. 4).

F

Interlocutory Proceedings

- Application was made by the registrar by summons for directions for particulars and other interlocutory relief. Particulars were requested of matters pleaded in, among other paragraphs, paras. 11 (b)-(d) and 12 (b) of the statement of case of the federation. Application was also made for discovery and that certain listed documents should be received in evidence at the final hearing without formal proof and that correspondence might be put in as evidence of the refusal of chemists named therein to deal in specified goods and that extracts from reports by salesmen to manufacturers or their reports to manufacturers of conversations with chemists should be admitted as evidence of the refusal of the chemists to deal in or display a certain product and other non C.F. products. Application was also made that the parties should agree a document setting forth all registrable restrictions contained in the agreement that was the subject of the proceedings, but this was adjourned to enable the parties to reach agreement and the agreed statement has been set out, ante. On the hearing of the summons for directions under r. 33 of the Restrictive Practices Court Rules, 1957, on July 9, 1958, before DEVLIN and UPJOHN, JJ., in open court—

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(i) *Statements in writing.* DEVLIN, J., stated that the hope which he had expressed on Apr. 22, 1958, when the date for the final hearing of the reference was fixed, that as much as possible of the evidence would be presented in writing before the hearing could relate only to memoranda and statements of witnesses whom it was proposed to call, and that there would be no question of a witness not coming up to proof because the memorandum of his proof would be considered as an expression of his views. The position in the Restrictive Practices Court was not the same as it was in an ordinary case, where it would be most undesirable for a witness' proof to be put in, because the court would then be

getting a story which had been prepared beforehand. Those considerations did not apply. If, for example, an expert witness did not appear to come up to proof it might merely mean that he had forgotten some item. What His LORDSHIP had said in regard to experts applied to most witnesses in this kind of procedure. A document could be digested much more rapidly by the court than question and answer. A

(ii) *Particulars* (r. 36 (b) of the Rules of 1957). The relevant passages in the statement of case of the federation were— B

“ 11 (b) The election of members [viz., members of the federation] is decided by the council. There is no restriction on the total number of members or the number of members in any class. Membership is open to all applicants who satisfy the necessary conditions and standards. Each application is dealt with on its merits, applications for each class of membership being considered by the council as a whole. (c) As to manufacturer applicants, the council normally regards it as necessary that, in addition to his products conforming to C.F. standards, the manufacturer should have satisfactory ‘standing’ and credentials, suitable factory and warehouse accommodation, adequate staff (including a pharmacist or other suitably qualified person), adequate analytical and scientific control of production. (d) As to wholesaler applicants, the council normally regards it as necessary that (as stated in r. 37) the wholesaler should be of good standing and reputation, be engaged wholly or mainly in wholesale trading with persons entitled to receive C.F. products, stock a substantial range of products, and possess sufficient facilities for and carry on a bona fide wholesale trade with such persons. C D E

“ 12 (b) Under r. 38 (v) manufacturer members must submit all eligible products (i.e. all proprietary medicines as defined) for inclusion in the C.F. list. Such a product is submitted in the first instance to the C.F. standards committee, which examines the claims and presentation put forward by the manufacturer in relation to its disclosed formula and makes recommendations thereon. The question whether the product is to be included is decided by the council in accordance with r. 32 to r. 35. This decision is often taken after the manufacturer has accepted recommendations. Rule 32 (iii) stipulates the matters to which the council has regard, namely—manufacturing facilities, quality and presentation, suitability for purpose and claim made in respect thereof, advertising and marketing policy, reasonable relationship between cost and retail price—and provides that the product shall comply in all other ways with the current C.F. code of standards.” F G

Application was made by the registrar for, among other particulars, particulars under para. 11 (b) of the necessary conditions and standards in respect of each condition, under para. 11 (c) of the satisfactory standing of manufacturer applicants and of the satisfactory credentials, of the suitable factory and warehouse accommodation, of the adequate staff necessary and of the adequate analytical and scientific control of production, stating the tests of adequacy and the conditions to be complied with; under para. 11 (d) of the good standing necessary, of good reputation, of the necessity to stock a substantial range of products and of the necessity to possess sufficient facilities for wholesale trade with chemists. No order was made on this application, DEVLIN, J., stating that at this stage an application for particulars of this sort would not be allowed and that the sort of information which was wanted under a detailed application of this description could be got more satisfactorily by way of statements of witnesses. If, after these had been received, the registrar could make out a case that inquiries which could not have been made before receipt of the statement would result in material of importance, such an application might be allowed. H I

A At the beginning, however, of proceedings in this type of case all formalities should be reduced as much as possible.

No order was made for particulars under para. 12 (b) of the statement of the case in relation to the reasonable relationship between cost and retail price, it being stated on behalf of the federation that there were no minimum and maximum percentages for retailers' margins. DEVLIN, J., stated that, if the particulars

B had originally been phrased as asking for the minimum and maximum percentages (if any), he would have expected the federation to answer by letter, and he hoped that in future that type of matter might be concluded by correspondence and would not be brought before the court.

(iii) *Discovery* (r. 41 of the Rules of 1957). Application was made by the federation for discovery in relation to investigations that had been made by
C the registrar for the purpose of acquiring material to put before the court in the present proceedings. An order for discovery was made in the usual form which did not, therefore, oblige the registrar to make discovery of documents which might be privileged as having been brought into existence for the purposes of the reference. DEVLIN, J., stated that the registrar was not in the position of an ordinary litigant in that he appeared in order to see that the court arrived
D at the right decision and, if documents which he had were material, he would presumably be willing to produce them in accordance with his duty.

(iv) *Admission of documentary evidence* (see r. 36 (g), r. 54 and r. 55 of the Rules of 1957). Application was made for a statistical analysis to be admitted in evidence; the analysis concerned sales of medicinal products by grocers and was compiled from answers to about 200 letters sent out at the instance of
E the registrar. This application was adjourned until July 30, 1958, on the registrar's proposal to present the data in the form of an agreed statement. Application was made to admit in evidence a bundle of correspondence, comprising inter-office memoranda of two manufacturers and letters from chemists to them relating to particular products, as evidence of the refusal of the chemists named in the correspondence to trade in the manufacturer's goods. It being stated that
F there would be witnesses from manufacturers who would give evidence concerning their products, it was decided that the bundle of documents should be admitted as evidence without prejudice. Similar application was made by the registrar for the admission in evidence of a collection of reports and extracts from reports made by salesmen to manufacturers about conversations with chemists as evidence of the refusal of the chemists named to trade in or display
G non C.F. products. No order was made in relation to documentary matter, but a notice to admit facts, based on it, was to be formulated and given by the registrar (see r. 40 of the Rules of 1957).

July 30. At the adjourned hearing, it was stated that agreement had been reached on all outstanding matters raised on the summons for directions and that
H written statements by witnesses would be exchanged between the parties by Sept. 16, and submitted to the court when they were exchanged; sufficient information about the manner in which the federation treated applications for membership would be in the statements given in exchange by the federation. Undertakings were given by both parties limiting publication of the statements. DEVLIN, J., stated that the undertakings would cover the position up to the
I time when the statements were used in court but thereafter, as the court sat in public, they would become part of the public record.

Hearing

At the hearing, the court intimated that it would decide first whether the restrictions by which the federation sought to control the sale of all proprietary medicines, i.e., by prohibiting sale to the public except in the course of a business which was under the personal control of a registered pharmacist and carried on from premises registered under the Pharmacy and Poisons Act, 1933, s. 12, were

restrictions within the meaning of s. 20 (1) of the Act of 1956. It was agreed A
between the federation and the registrar that, if the main restriction was a
restriction within the meaning of the Act of 1956, then r. 36, r. 38 (i)-(iv), r. 39,
r. 40 (i) and (ii) and r. 41 (ii) of the Constitution and Rules were restrictions
within the meaning of the Act. At the conclusion of the hearing on Oct. 13,
the court found that the main restriction did not come within s. 21 (1) (a) or B
(b) of the Act and, therefore, it was void.

T. G. Roche, Q.C., and Joseph Dean for the Chemists' Federation.

C. P. Harvey, Q.C., and J. R. Cumming-Bruce for the registrar.

Cur. adv. vult.

Nov. 3. **DEVLIN, J.**, read the following judgment of the court: This case C
concerns restrictions on the sale of proprietary medicines. The fundamental
principle adopted by the Chemists' Federation is that proprietary medicines
should be sold to the public only by or through registered pharmacists. For this
purpose, the relevant definition of a medicine is that which is contained in r. 32
(iii) of the federation's rules, and is

"a pharmaceutical or medical preparation of a proprietary character D
(including surgical dressings) intended for the . . . alleviation of human
ailments . . ."

This is a wide definition and includes some preparations which might not popu-
larly be thought of as medicines, as, for example, corn caps, barrier creams,
insect repellents and blackcurrant and glycerine pastilles. E

A proprietary medicine is one which is sold under a proprietary designation
as, for example, Beecham's pills. Its distinguishing marks are that it is sold
made up in a bottle or packet containing the name of the proprietor and the
formula from which the medicine is compounded, and usually also directions
for its use and a description of the ailments which it is intended to alleviate.
It is distinguishable from a medicine made up by a chemist (that term is used F
in this case interchangeably with the more accurate description of registered
pharmacist) to suit a particular patient, either on a doctor's prescription or as
something which he himself recommends. The distinction is recognised by
legislation; no one but a chemist may sell a medicine made up and recom-
mended by himself but, except for poisons and the like, anyone may sell a G
proprietary medicine. There is a wide range of proprietary medicines. At one
end there are drugs made up for use in hospitals or by doctors; at the other end
there are the common household remedies, such as aspirin, salts, cough mixtures
and digestive tablets. Medicines in the former class are advertised, if at all,
only in a very limited way; many of the household remedies are extensively
advertised and thereby a large popular demand is created.

Included among the proprietary medicines there are drugs which contain H
poison or other dangerous substances. Their sale to the public is forbidden
by statute, except in the course of a business which is under the personal control
of a registered pharmacist and carried on from premises which must also be
registered. The restriction which we have to consider seeks to control in the
same way the sale of all medicines; the principle behind it, as set out in the
handbook of the federation, is I

"That the correct channel for distribution of medicinal preparations is
through premises registered under s. 12 of the Pharmacy and Poisons Act,
1933."

Statutory prohibitions cover perhaps a quarter of all proprietary medicines.
The bulk of proprietary medicines is, therefore, left free of all legal control.
They can be sold not only in the 15,000 chemists' shops in England and Wales,

A but also in about 200,000 other retail outlets. These other outlets consist of drug stores (that is, shops which sell goods similar to those sold in a pharmacy but which, having no pharmacist on the premises, cannot do any dispensing), grocers and general stores.

The restriction imposed by the federation on its members dates from 1935, and was not designed to supplement any defects, actual or supposed, in legislation. It originated out of the desire of the retail chemists to protect themselves against what they regarded as unfair competition. This occurred especially in the marketing of new products. A manufacturer who wants to introduce a new product may feel that he is unlikely to get the public to try it unless it is recommended and sold by chemists. The complaint of the chemists was that, when the product had become accepted, the manufacturers began to supply it to every sort of shop and the chemists lost to other tradesmen part of the market which their efforts had helped to build up. This was the origin of the Chemists' Federation and of the C.F. list. The manufacturers who belong to the federation agree that every product of theirs which is a medicine within the definition in r. 32 (iii) may be put on the C.F. list, and they undertake that no product on the list shall be supplied except to retail chemists or to wholesalers who are members of the federation and who also undertake not to supply except to retail chemists. A retail chemist for this purpose is a person who is authorised to sell poisons under the Act of 1933. It must be observed that the sale is not restricted to retail chemists who are members of the federation—about two-thirds of them are—but is permitted to any retail chemist. It must also be observed that C.F. manufacturers do not demand from the chemists, whether they are members or not, any undertaking that they will sell only C.F. goods, that is, goods made by C.F. manufacturers. But C.F. manufacturers do expect that chemists who are members of the federation will promote C.F. goods as against "non C.F." goods, that is, goods produced by their competitors who are not members of the federation; and the federation does its best, by means of recommendations and otherwise, to induce chemists to adopt this policy. To receive C.F. goods as a wholesaler it is necessary to be a member of the federation. There are other requirements for wholesaler membership besides an undertaking to re-sell only to retail chemists; but it is unnecessary for us to consider what these other requirements are, since, if the restrictions on sales to retail chemists are held to be void, those which affect wholesalers must inevitably perish also.

We have made it plain that the federation does not include all manufacturers of proprietary medicines. Though it is a very considerable body, it controls less than half the trade—122 out of 356 manufacturers belong to it. The medicines which they manufacture and which are put on the C.F. list number 4,000 out of a total of 9,000 products which can be described as proprietary medicines. The sale of proprietary medicines on the C.F. list amounts in value to about one-third of the sale of all proprietary medicines.

This is the background against which we have to consider the fundamental question whether it is contrary to the public interest that sales of medicines should be effected only through chemists. This is the form of the determination which we are required to make by s. 20 (1) of the Restrictive Trade Practices Act, 1956. But, since this is the first judgment delivered under the Act, it is as well that we should make it clear that we are not, in our view, in any way required to answer this question as a matter of policy. We are not to consider whether competition in the sale of medicines is desirable or undesirable, whether drug stores are a suitable outlet for them or whether chemists should have a monopoly, or whether the federation is a good or a bad thing. Such questions of general policy are settled by the Act. This is the effect of s. 21, by which we are bound to conclude that a restriction is contrary to the public interest unless it is brought within one of seven categories—para. (a) to para. (g)—there set out. For each category there is prescribed a particular set of circumstances about which we must be satisfied before admitting the restriction into it; and for each there is

also a general requirement that the restriction is not unreasonable having regard to the balance between the relevant circumstances and any detriment to the public resulting from the restriction. Our task is the ordinary task of a court of law to take the words of the Act according to their proper construction and see if, on the facts proved, the case falls within them. The federation has selected two categories, para. (a) and para. (b), and claims that the restriction should be placed in one or other of them. For category (a), we have to be satisfied that the restriction is reasonably necessary to protect the public against injury in connexion with the consumption or use of medicines. This we shall now proceed to consider.

Avoidance of injury to the public was not the criterion employed in drawing up the C.F. list. Its object was, and still is, to restrict competition. This is by no means fatal to the federation's case. If the sale by unqualified competitors would, in fact, cause injury to the public, the test is satisfied notwithstanding that the prime object of the restraint is not the avoidance of injury; it is enough that it should be the effect. But we mention this because it clarifies the essence of the proposition presented to us. No one has ever reviewed the C.F. list in order to determine whether the sale of any particular medicine through an unqualified person is likely to be injurious. We are not now invited to dissect the list in this way. The federation's case is one and the same in respect of the whole list from sedatives and hypnotics at one end to cod liver oil at the other. The case is not that there are at one end of the list some injurious substances which have not yet been caught by statutory control and which should be reserved for chemists; we are not invited to consider such substances separately or to discriminate at all. If those compiling the list had had as their object the avoidance of injury, they might have made up a very much reduced list, and might then have put forward a plausible case for it on different lines to those which have been argued. But, plainly, their object was not to avoid injury but to avoid competition and to maintain a preserve for chemists, especially, no doubt, in the valuable field of popular household remedies. To achieve this end, the federation's proposition is, and has to be, all-embracing; it is that, as a matter of principle, it is not safe for any unqualified person to sell any medicine.

What is the difference between a sale effected by an unqualified person and one by a chemist? The federation's case rightly seizes on the only significant distinction, which is that a chemist who is told of the condition to be relieved has the training and ability to select the appropriate remedy and to advise on its use. It follows that there is no distinction between a sale by a chemist and one by an unqualified person unless the chemist is told of the condition and given the opportunity of exercising his skill. It follows, too, that, if there is a real risk of injury, it is no protection merely that the sale should be effected from a chemist's premises; it would be necessary to make it a rule that the sale should be effected only by the chemist himself and after due inquiry had been made. No one proposes a restriction of this sort. One has only to consider it in relation to a product such as " Buzz Off " Cream to realise how impracticable, and even how ridiculous, it would be. But, if there is a real risk of injury through ignorant self-medication, what protection is afforded by anything less? We believe that the vast majority of proprietary medicines sold by chemists are sold over the counter, frequently by unqualified assistants, without any inquiry being made, just in the same way as they are in drug stores or general shops, and that it has never up till now occurred to anyone to think there is any real risk of injury in the process. The sort of proprietary medicine that is usually demanded is designed for use without advice, and in only a small minority of sales is there any need for advice. A sensible person who is in doubt about the right medicine will, of course, always go to a chemist in preference to an unqualified person, and the removal of the restriction will in no way interfere with that. The restriction can protect only a fraction of this small minority, for to qualify for the fraction three

- A conditions must be satisfied: first, the buyer must be a person in need of advice but without the good sense to ask for it from a qualified source; secondly, he must be served by the chemist himself; and thirdly, unless it is just a matter of luck, there must be some manifestation which causes the chemist to make some inquiry. We have been given illustrations of cases where an inquiry made by a chemist has prevented the wrong treatment from being pursued and we have no doubt that such cases do from time to time occur. But we are satisfied that, in proportion to the total of the sales of proprietary medicines, they are quite negligible.

- We are strengthened in this conclusion by a further consideration. Before 1935, the sale of all proprietary medicines was unrestricted. Since that time the efforts of the Chemists' Federation have succeeded in restricting to chemists the sale of not much more than half in value of the proprietary medicines sold in this country. That is more than the one-third that is produced by C.F. manufacturers but some of the output of non C.F. manufacturers goes to chemists. We have no exact figures, but the evidence suggests that nearly half of the total output of all manufacturers, whether inside or outside the federation, is retailed to the public by unqualified persons. Nevertheless, we have not had any concrete proof of any single case of injury, whether before or after 1935, resulting from the sale of medicine by an unqualified person. Nor have we had any independent and experienced witness, such as a doctor in busy practice, to testify that this is a contingency which causes him any serious alarm and to exemplify the danger.

- We must now apply our finding of fact that the risk of injury is negligible to the terms of the paragraph on which the federation relies. Is the restriction "reasonably necessary" to protect the public against injury? The expression "reasonably necessary" was considered by BUCKLEY, J., in *Stanford v. Roberts* (1) ([1901] 1 Ch. 440); in this case it occurred in the Settled Land Act, 1890, s. 13, which permits capital money to be applied in "making any additions to or alterations in buildings reasonably necessary or proper to enable the same to be let". BUCKLEY, J., said (*ibid.*, at p. 444):

- "The second point is whether this is an alteration 'reasonably necessary or proper' to enable this property to be let. I understand 'reasonably necessary or proper' to mean something which, although not absolutely necessary, a reasonable and prudent owner of property, if he were the absolute owner, would do. Mr. Buckmaster says that tenants will be found if the floor boards are replaced from time to time. I agree that the new floor is not absolutely necessary, but, in my opinion, it is what a reasonable and prudent owner would do if he were absolutely entitled to the property."

- We think that this passage is a helpful guide to the meaning of "reasonably necessary" in the paragraph we are considering. We have to ask ourselves whether a reasonable and prudent man who is concerned to protect the public against injury would enforce this restriction if he could. He would not do so unless he was satisfied, first, that the restriction afforded an adequate protection and, secondly, that the risk of injury was sufficiently great to warrant it. It is well established as a general principle that the degree of care which a reasonable and prudent man should take depends on the magnitude of the risk. Cases such as *Glasgow Corpn. v. Muir*, (2) ([1943] 2 All E.R. 44), and *Bolton v. Stone* (3) ([1951] 1 All E.R. 1078) show that the prudent man is not obliged to guard against the bare possibility of injury. We think, therefore, that it is not enough for the federation to show a chance of injury. We find that the protection which the existence of this restriction is supposed to afford is not reasonably necessary because the risk of injury is too slight to justify so wide a restriction and because, if the risk were greater than we think it is, the restriction affords no real protection against it.

We reach this conclusion on the terms of para. (a) without having to consider the terms of the general requirement*. If, however, we are wrong in our construction of the paragraph or in our assessment of the risk, we should reach the same result by the application of the general requirement. The general requirement lets in additional evidence to establish a detriment to the public or a section of the public if the restriction remains. The registrar has in this case relied on such evidence but we have not found it necessary to consider it. Inconvenience is inevitably caused to the public generally by not being able to buy the commodities it wants from any retailer who is willing to sell them, and we do not think that the risk of injury can possibly be rated so high as to say that, on balance, it justifies that detriment. A B

We turn now to consider category (b) and the contention of the federation that the removal of this restriction would deny to the public other specific and substantial benefits or advantages within the meaning of the paragraph. The federation sets up four specific benefits. The first is that the restriction affords to chemists an opportunity of giving beneficial advice. We have already dealt with the considerations affecting this point; we need not say more than that we think that such opportunities are negligible and, accordingly, are not satisfied that the removal of the restriction would in this respect deprive the public of any substantial benefit or advantage. C D

The other suggested benefits introduce new considerations. The first of them concerns the work of the Standards Committee of the federation. This is a body which was formed in 1941, and whose function it is to approve the products on the C.F. list. It examines the formula of any medicine on the C.F. list to see if it is suited to the conditions which it is designed to alleviate; and it examines the claims which are made on behalf of the medicine to see if they are justified. Since 1942 no new product has been put on the C.F. list unless the Standards Committee passed it in these respects; and the committee has also gone through many of the products that were on the list before that date, and in a number of cases has required the manufacturers concerned to modify their claims. This is a good work, and, if it stood by itself, might well be considered of substantial benefit to the public, but there are other factors to be taken into consideration. E F

The list is divided into Class A products, which are not advertised to the public generally, being intended for use by doctors and in hospitals; and Class B products which are so advertised. The work of the Standards Committee has to be considered separately in relation to these two classes. Class B is plainly by far the more important; it comprises more than two-thirds of the list and the making of spurious or exaggerated claims through the medium of the popular press might well be disadvantageous to the public. It appears, however, that for some years before the Standards Committee was formed this danger had been appreciated and safeguards devised. The Proprietary Association of Great Britain (known as P.A.G.B.) was founded in 1919 as an association of manufacturers of British proprietary medicines. It now has ninety-two members, twenty-three of them being also members of the Chemists' Federation. One of its specific objects is to exercise control over its members' advertisements to the public. It must include among its membership most of those manufacturers who go in for public advertisement on a large scale, for, although the products which it reviews number only three hundred, their annual sale amounts in value to about eighty per cent. of the value of all publicly advertised medicines. Like the federation, it has the advantage of distinguished medical consultants to whom it can submit the therapeutic claims made on behalf of any product. In 1937, the association published its first code of standards governing advertisements. For some time before that date, the newspapers themselves had been concerned to G H I

* Viz., the words of s. 21 (1) of the Restrictive Trade Practices Act, 1956, after the end of para. (g). These are printed at p. 449, letter I, ante.

- A stop the undesirable advertisement of medicines; in particular, the Newspaper Proprietors Association had formed a committee which laid down certain standards. When the P.A.G.B. issued its code in 1937, the Newspaper Proprietors Association at once agreed to apply it. In the course of time other associations of newspaper proprietors and also a number of advertising associations came into the scheme, and in 1945 a document was issued known as the British Code of Standards relating to the advertising of medicines and treatments. It is based on, and is substantially the same as, the P.A.G.B. code; but as all manufacturers of proprietary medicines are not members of the P.A.G.B., the British code is necessary to deal with those who are not. We are satisfied that this code is now accepted and enforced throughout the newspaper world, and also in other advertising media, such as posters and television. There are, therefore, other
- B bodies which control satisfactorily the advertisement of medicines without imposing restrictions on their sale, and so the work of the Standards Committee in relation to Class B products is, from the point of view of the public, unnecessary and cannot be classed as a substantial benefit.

There is no body, other than the federation, which does similar work for Class A products, that is, those which are not generally advertised. But, in the

D case of medicines which, before they reach the public, must pass through the hands of doctors or hospitals, there is not the same need for scrutiny. No doubt it is helpful, but we are not satisfied that it is of substantial benefit to the public. Certainly, the benefit, if any, in respect of either class of product, does not outweigh the disadvantage to the public of the general restriction on the sale of medicines.

- E The next important benefit to the public which is said to flow from the existence of the restriction is that it keeps in business a number of chemists in country districts; it is argued that, if they were forced out of business, the National Health Service and the public in those districts would suffer. We have not had to consider whether, if this was so, the case would fall within category (b), because we are not satisfied that the removal of the restriction would drive any appreciable number of chemists out of business. The evidence which we have had is too nebulous to support that conclusion. It consists almost entirely of a survey of the small chemist's position made in 1954 for the purposes of the National Health Service. This was a sample survey based on returns made by a very limited number of chemists. It was relied on as proving that the income of small chemists was so low that any reduction in their earnings would be disastrous.
- G The extent to which there might be such a reduction as a result of increased competition had to be left to guesswork. The removal of the restriction would not give the unqualified trader a new class of business. Nearly all the popular household remedies are represented already by non C.F. brands as well as by C.F. brands, and the general dealer obtains all the former brands without restriction. There are some C.F. brands which, in some districts, are evidently preferred
- H to their non C.F. rivals, and the chemists in those districts who have hitherto enjoyed a monopoly in the sale of them are bound to suffer a loss on these particular lines. But we are not satisfied that, over the whole of his business, the average small chemist would be unable to meet the challenge of new competition. Finally, we have no satisfactory evidence of the number of chemists
- I who, on this argument, it would be in the public interest to preserve in business. We do not know what proportion serve country districts or how many, if any, of them, are essential to the maintenance of the National Health Service. In our judgment, the federation did not succeed in lifting this point out of the realm of speculation.

Finally, it is suggested as a benefit to the public that retail chemists have better facilities than other tradesmen for the storage of medicines. We think that there is nothing in this point.

The federation has, therefore, failed to satisfy us that a restriction which confines to chemists the right to sell medicines is justifiable in accordance with s. 21. Before we assess the effect of this general conclusion on those provisions in the rules of the federation which are specifically attacked, there is one incidental point with which we must deal. During the hearing of the case we allowed to be put to the witnesses *de bene esse* a number of questions designed to obtain expressions of opinion; and at the end of the case we heard argument on the admissibility of the evidence obtained. The evidence has not affected our judgment but, having heard the argument, we think it desirable to give a ruling. It was necessary that we should be fully informed about the conditions of the trade and about the circumstances under which medicines are retailed to the public. The witnesses who can best give us information of this sort are persons who are experienced in the trade; a great number of these were called and they were properly asked questions to elicit such information. Counsel for the registrar has submitted that these witnesses can, for this purpose, be treated as experts, so that an opinion given about conditions in the trade and the hearsay on which it is based is admissible under the ordinary principles of common law. If this is not so, he submits, we have power to admit the evidence under r. 55 of the Restrictive Practices Court Rules, 1957. We accept this submission. But these witnesses were not experts in the sense of being qualified by study or experience to form a better opinion on matters within their own special field of knowledge than could be formed by the ordinary man. They spoke with knowledge of their trade, but that did not qualify them to express opinions about what is injurious or beneficial to the public. Nevertheless, a great many questions were put from both sides in the course of the case that were purely argumentative and were, indeed, justified by counsel for the registrar on the ground that it would be unfair not to give a witness the chance of dealing with points that were being made against his side. We think that there is no obligation on counsel to invite argument in this way; moreover, expressions of opinion by witnesses who are not independent experts but are attached to one side or the other about the matters we have to decide are quite valueless.

We turn now to consider the effect of our general conclusion on the restrictions contained in the federation's rules. The registrar contends, but the federation does not admit, that there is also a number of restrictions in the form of recommendations set out in the handbook of the Chemists' Federation. We have decided that the matter of these alleged restrictions can stand over for further argument, if necessary; the effect of our judgment on the rules may make further argument of academic interest only. Except on two points, the parties are agreed on which clauses in the rules are restrictions within the meaning of the Act, and are agreed also that our general conclusion is fatal to them. The two points arise under r. 38 and r. 40.

Rule 38 lays down the conditions affecting manufacturer members in five paragraphs. The first four paragraphs deal with the terms on which manufacturers may sell their products and are admittedly restrictive. Paragraph (v) reads as follows: "Manufacturer members shall offer for inclusion in 'the C.F. list' all their eligible products as defined in r. 32 (iii)". Counsel for the federation has submitted that this is not a restriction within the meaning of s. 6 of the Act, because it does not affect the supply or sale of the product; if the product is rejected for inclusion in the C.F. list, the manufacturer is free to sell it to anyone. If, however, the product had been accepted, it could have been sold only to chemists; and the object of this additional paragraph was to bar a way out of the general restriction that would otherwise have been open to the manufacturer; but for this paragraph he could have evaded all restrictions on the sale of any medicine by the simple expedient of not submitting it for inclusion in the C.F. list. It is argued that, once the general restrictions on the sale of medicine by manufacturers in paras. (i) to (iv) inclusive of the rule have been

A removed by our judgment, there is nothing restrictive about para. (v). This may be so if the paragraph is looked at in isolation, but we think that we have to regard the rule as a whole. We cannot go through a rule, which is designed as a whole, sentence by sentence, considering as we come to each sentence whether or not it is void, and construing the later sentence in the light of the elimination of the earlier ones. The provision in para. (v) is ancillary to the others and must

B stand or fall with them.

The other point arises under r. 40, which contains the conditions imposed on the retail chemists. There are four conditions, and each one appears to be independent of the others. The first two conditions are admittedly restrictive; the fourth condition is bound up with the recommendations in the handbook to which we have referred and we do not consider it at this stage. The third

C condition is in the following terms:

"Save with the consent of the proprietor, no C.F. product shall be sold otherwise than in the box, bottle, package or other enclosure (if any) in which the product has been packed for sale to the public by such proprietor except when dispensed."

D The object of this must be to protect the manufacturer. The manufacturer naturally wants to keep for himself and to hold under his own name the goodwill which the public may extend towards a good product and so cannot allow a chemist to sell it as his own make. This is a harmless provision of a kind that any manufacturer might reasonably put into a contract with his buyer. But it is not enough to show that the provision is harmless and reasonable; the law now

E is that these stipulations may not have put behind them the power of a combination unless they also make for the public interest, that is, satisfy the requirements of s. 21. We cannot see that the provision holds any substantial benefit for the public or protects them from injury. We agree that, if medicines and packages got mixed up so that the wrong label got attached or the wrong directions, injury might easily result. But we cannot believe that a registered pharmacist

F is likely to be careless in this way and we think the risk of injury negligible; moreover, the rule would give no protection worth adding to existing sanctions, for carelessness of this sort would certainly lay a chemist open to an action at law and, perhaps, to criminal proceedings under the Food and Drugs Act, 1955.

The result of these final considerations is that we declare to be void r. 36, r. 38, r. 39, r. 40 (except para. (iv)), and para. (ii) of r. 41*.

G The registrar has made an application for an injunction under s. 20 (3) of the Act. He proposes that the form of the injunction should follow the general words used in the sub-section and that we should make an order restraining the federation or any of its members from giving effect to, or enforcing or purporting to enforce, the agreement contained in the rules we have declared

H void, and from making any other agreement to the like effect. He does not put forward any special grounds for an injunction; he submits that, in the ordinary case, the injunction should follow the declaration as a matter of course. Counsel for the registrar points out that the effect of the Act is to render the restrictive terms void merely and not illegal. The courts will not enforce a void agreement, but normally, if the parties choose to accept it as binding in honour, they are at

I liberty to act under it; if the agreement is illegal as well as void, they may not do so. The registrar anticipates that the federation will, unless restrained by this court, continue to enforce these rules as best it can without the aid of the law.

We think that this argument loses sight of the reason why these restrictions are declared void. It is because, on the facts we have found, they are contrary

* For these provisions, see p. 451, letter F (r. 36), p. 451, letter I, to p. 452, letter C (r. 38), p. 452, letters D to H (r. 39, r. 40), and p. 452, letter I (r. 41 (ii)), ante.

to the public interest and, in conformity with the Act of Parliament, we have so declared. The phrase "contrary to the public interest" may or may not have any legal significance. Its terms are novel; but at least it makes plain to the ordinary man the view of Parliament in the matter. When Parliament has resolved that a practice is not in the public interest, we should not expect the federation, whose council consists of men of the highest reputation, representing in many cases well-established firms, to carry on just as it was doing before, and we are told by counsel for the federation that the council has no intention of doing so. Moreover, we do not think that Parliament intended that an injunction in general terms should follow the declaration as a matter of course. An injunction in the terms asked for by the registrar would be equal in effect to an express provision in the Act that all the restrictive terms were forthwith to be declared illegal, for the breach of an injunction carries penalties at least as serious as those which Parliament normally ordains for a breach of a statute in this class. If Parliament had intended a liability to penalties to arise automatically, we think it would have made the restrictive terms illegal as well as void. We think that Parliament intended a milder approach in accordance with the ordinary rule that an injunction is not granted unless the commission or repetition of an offence can reasonably be apprehended. In this case, no question of that sort has yet arisen. Up till now the federation has not known whether its rules were good or bad and, like many other bodies in a similar position, has been concerned simply to ascertain the effect of a new law. There is no case here for an immediate injunction. In any case in which we find that there is a determination on the part of anyone to behave in a manner that is contrary to the public interest as laid down in the statute, we shall act differently.

Having regard to these considerations and in the exercise of our discretion under the Act, we do not propose to grant injunctions as a matter of course. It must be a question of discretion in each case. The federation will be given a reasonable time to put its affairs in order and should not have to do so in the shadow of an injunction and in the fear that a false step may result in immediate proceedings for contempt of court against itself or any of its members individually. Counsel for the federation, on behalf of his clients, has offered to keep the registrar informed of the steps which the federation will be taking in consequence of our declaration and, if the registrar is given good cause for dissatisfaction, he can make another application. If he does so, he should specify in his application the particular activities which he desires to be restrained. The words in s. 20 (3) of the Act define the area within which the power of injunction is to operate and are not to be taken automatically as a formula for the order itself. A breach of the orders of this court, like the orders of the High Court, is punishable as a contempt; and it is, therefore, of the first importance that every party who is made subject to such an order should be told as precisely as possible what it is that he may not do.

The order of the court will consist of a declaration in the terms indicated in this judgment.

Declaration accordingly.

Solicitors: *Kenneth Brown, Baker, Baker* (for the Chemists' Federation);
Treasury Solicitor.

[Reported by G. A. KIDNER, Esq., Barrister-at-Law.]

A Re SHIPWRECKED FISHERMEN & MARINERS' ROYAL BENEVOLENT SOCIETY CHARITY.

[CHANCERY DIVISION (Danckwerts, J.), October 31, 1958.]

Charity—Scheme—Investment—Extension of powers of investment—Charity regulated by statute—Jurisdiction of court—Trustee Act, 1925 (15 & 16 Geo. 5 c. 19), s. 57 (1).

Trust and Trustee—Investments—Extension of range of investments—Whether court has jurisdiction to confer wider power of investment—Trustee Act, 1925 (15 & 16 Geo. 5 c. 19), s. 57 (1).

There is jurisdiction under s. 57 (1) of the Trustee Act, 1925, for the court by its order to confer on trustees a power to invest in investments outside the range of those authorised by statute for the investment of trust funds, if without such an order the trustees have no such power and if it is expedient in the opinion of the court that they should have it (see p. 467, letter I, to p. 468, letter A, post).

In 1850 a charity was incorporated by a statute, the Shipwrecked Fishermen and Mariners' Royal Benevolent Society's Act, 1850, which regulated the charity and conferred powers on it including, by s. 11, power to invest its funds in a limited range of investments. The charity desired to extend its powers of investment.

Held: the court had jurisdiction to extend the charity's powers of investment by a scheme because the conferment of wider powers was not inconsistent with, but was an extension of, the power conferred by s. 11; and the court also had jurisdiction under the Trustee Act, 1925, s. 57 (1), in exercise of which the court would confer on the charity power to invest in a wider range of investments.

[**Editorial Note.** In relation to trust instruments generally regard should now also be had to s. 1 of the Variation of Trusts Act, 1958, under which there is jurisdiction to approve arrangements enlarging trustees' powers of managing or administering trust property. As regards the jurisdiction to confer powers by way of scheme on a charity the present decision should, if the charity is an unincorporated association, be considered with *Re Tobacco Trade Benevolent Association*, p. 353, ante.

As to the jurisdiction of the court in respect of a charity regulated by statute, see 4 HALSBURY'S LAWS (3rd Edn.) 417, para. 868; and for cases on the subject, see 8 DIGEST (Repl.) 508, 2325-2333.

As to the jurisdiction of the court under s. 57 of the Trustee Act, 1925, see 33 HALSBURY'S LAWS (2nd Edn.) 298, 299, para. 521.

For the Trustee Act, 1925, s. 57, see 26 HALSBURY'S STATUTES (2nd Edn.) 138.] Case referred to:

(1) *Re Royal Society's Charitable Trusts, Royal Society v. A.-G.*, [1955] 3 All E.R. 14; 3rd Digest Supp.

Adjourned Summons.

The Shipwrecked Fishermen and Mariners' Royal Benevolent Society by a summons dated Feb. 21, 1958, asked for an order that a scheme be made in terms set out in draft minutes empowering it to invest its funds in a wider range of securities than was permitted in the Act by which it was regulated, the Shipwrecked Fishermen and Mariners' Royal Benevolent Society's Act, 1850, or by the Trustee Act, 1925, s. 1. The range of investments included trustee investments, freehold or leasehold land in Great Britain (the leasehold land being such as was held for a term of which not less than sixty years remained unexpired), securities of or guaranteed by the government of the United States of America, local authority stocks and stocks of public authorities public utility companies or railways within the Commonwealth or the United States of America, and debentures or shares of incorporated companies within the Commonwealth or the

United States of America. The general power of investment was expressed to be subject to various qualifications, one of which was that the investments must be quoted officially on one of the recognised stock exchanges in London, New York, Toronto or Montreal, and another of which limited investments in ordinary or deferred shares to those of companies having at the time of investment a paid up capital of not less than £750,000 or its equivalent at the current rate of exchange.

G. H. Newsom, Q.C., and J. A. Gibson for the applicant, the charity.
Denys B. Buckley for the respondent, the Attorney-General.

DANCKWERTS, J.: This is a case of some general importance, because it involves a situation on which the authorities are far from clear. It concerns a charity which was founded for present purposes by an Act of Parliament, the Shipwrecked Fishermen and Mariners' Royal Benevolent Society's Act, 1850, dealing with a number of charities, but mainly with the Shipwrecked Fishermen and Mariners' Royal Benevolent Society and certain other charities administered in connexion therewith.

The Act created a corporation and conferred on it various powers. The only one with which I am concerned is the power of investment, which is contained in s. 11, and I emphasise that, in my view, it is a power. That section provides as follows:

"That any of the moneys for the time being belonging to the said corporation, may be from time to time invested either in the name of the said corporation, or in the names of trustees for the said corporation, on mortgage of any manors, messuages, lands, tenements, or hereditaments of a clear and indefeasible estate of inheritance in fee simple, in England, Wales, or Ireland, free from incumbrances except quit rents and other small annual payments, or held upon any lease or leases for any term or terms of years of which not less than sixty years shall be unexpired, or in the purchase of stock in the public funds of Great Britain or Ireland, in exchequer bills, South Sea stock, or bank stock, and that the moneys or any part of the moneys so invested may be called in, and the payment of the same and of the interest thereof, or any part thereof respectively, may be required and enforced when thought advisable so to do on the part of the said corporation; Provided, nevertheless, that no money shall be so invested on mortgage unless, as a further security for the repayment of the money invested and the interest thereof, the mortgage be accompanied with a power of sale exercisable by or on behalf of the said corporation."

The present application seeks power to be conferred on the corporation to invest in a wide variety of investments, including what are sometimes called equities. It is to be observed that at the time when this Act was passed the practice of the Court of Chancery limited the permissible investment of trust funds to investment in bank annuities, and this Act gave a somewhat wider range than the court permitted. It is said that the whole of this investment provision is obsolete in the changed circumstances of the present time and that the benefit and proper execution of the charitable trusts is being hampered or prevented to some extent by the limited nature of the power of investment possessed by the corporation under s. 11.

The charity is a statutory charity, i.e., one founded and regulated by an Act of Parliament. In 4 HALSBURY'S LAWS OF ENGLAND (3rd Edn.), p. 417*, para. 868, it is said:

"*Charity regulated by statute.* The court has no jurisdiction to interfere in the administration of a charity established and completely regulated by Act of Parliament, unless authorised by the Act itself; but the court may make a

* Compare also *Trustees of the London Parochial Charities v. A.-G.* ([1955] 1 All E.R. 1).

- A scheme in respect of matters not provided for by the Act, and may enforce the observance of the provisions contained in the Act."

It is said on behalf of persons interested in the charity that the court is empowered to make a scheme to authorise a wider range of investments in this case, because the matter is not really covered by the very limited power of investment contained in s. 11 of the Act of 1850. On the other hand, it is said on behalf of the Attorney-General that that is not the right way of construing s. 11: that, though it is in form a positive permission, yet it involves a negative prohibition, and, therefore, to allow any wider investment of the trust funds would be to attempt to alter the statute by (as was said in one case) "a stroke of the pen", which the court has no power to do.

The cases to which I have been referred are far from clear, but the general principle which emerges is that the court cannot alter the statute by a stroke of the pen, and, therefore, cannot direct anything which is inconsistent with the terms of the Act of Parliament in question. The conclusion which I reach is that to allow a wider power of investment is to confer additional powers of investment, and, therefore, is not inconsistent with but is in aid of and supplemental to the powers of investment which are conferred by s. 11 of the Act. On that view it would be open to the court to confer the necessary powers by settling a scheme.

It seems to me, however, that the matter can be done in another way and in many respects I find this alternative the preferable way of dealing with the matter. Since the Act of 1850 there have been a number of Trustee Acts which deal with (among other things) the investment of trust funds, and the Act at present in force is the Trustee Act, 1925, which contains in the early part of the Act powers to invest in a number of things which are plainly quite outside the ambit of s. 11 of the Act of 1850. It has been accepted even by the Attorney-General in the present case that that range of investments contained in the Trustee Act, 1925, is open to the corporation for investing the funds of the corporation. To that extent, therefore, the principle has been accepted that the general Act of 1925 has modified the provisions of s. 11 of the Act of 1850. If that be so, why is it not also modified by the provisions of s. 57 of the same Act? It seems to me that it is. I cannot see why Acts passed by Parliament years after the earlier Act should not be read into the earlier Act and the powers contained in the earlier Act be modified accordingly; and it seems to me that s. 57 of the Trustee Act, 1925, allows that to be done.

I am aware that in one case* one of the judges of this Division expressed the view that s. 57 did not apply, without, I think, going into the matter because he found himself, as he considered, able to make a scheme which would produce, in the case of the trusts that were before him, exactly the same results as were asked for under the provisions of the Act. It seems to me that the provisions of s. 57 permit the court to allow a wider range of investments and to express it in a general order. Section 57 (1) of the Trustee Act, 1925, provides:

"Where in the management or administration of any property vested in trustees, any sale, lease, mortgage, surrender, release, or other disposition, or any purchase, investment, acquisition, expenditure, or other transaction, is in the opinion of the court expedient, but the same cannot be effected by reason of the absence of any power for that purpose vested in the trustees by the trust instrument, if any, or by law, the court may by order confer upon the trustees, either generally or in any particular instance, the necessary power for the purpose, on such terms, and subject to such provisions and conditions, if any, as the court may think fit and may direct in what manner any money authorised to be expended, and the costs of any transaction, are to be paid or borne as between capital and income."

The word "investment" is there, so that there seems to me no doubt that the

* *Re Royal Society's Charitable Trusts* (1) ([1955] 3 All E.R. 14).

court can authorise the investment by the corporation in a particular fund on a particular occasion. I also find in the sub-section that the court may confer on the trustees the power generally, and therefore, I cannot see why the court may not give a general power to invest under this power conferred on the court by the statute. It seems to me that that could be done in the present case. It really comes to the same thing as the method of a scheme. In either case the situation is one where the court is being asked to do something purely in the administration of the trust. It is not altering the substantive trusts in any way whatever; it is simply giving the trustees power, in the administration of the funds which they have under their control, to administer them in a more satisfactory and more effective way which the changed circumstances of a hundred years show to be necessary for the proper administration of the charity.

Accordingly, I am prepared to allow the summons to be amended so as to be entitled "In the Matter of the Trustee Act, 1925", and to make an order which will be prefaced by the recital "that there is no power . . . and that it is expedient . . .", and will refer to s. 57 of the Act of 1925 and will then give power to invest in the manner sought.

Order accordingly.

Solicitors: *Darley, Cumberland & Co.* (for the applicant); *Treasury Solicitor.*

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

GRIFFIN v. SQUIRES.

[QUEEN'S BENCH DIVISION (Lord Parker, C.J., Streatfeild and Diplock, J.J.), October 23, 1958.]

Road Traffic—"Road"—*Car park*—*Private footpath leading from car park*—*Footpath used by members of bowling club and holders of allotment gardens but not by general public*—*Whether car park itself, or as part of private footpath, a "road"*—*Road Traffic Act, 1930 (20 & 21 Geo. 5 c. 43), s. 121.*

The respondent, with the owner's consent, drove a motor car which was parked in a car park for some ten yards in the course of which the car went through a hedge and came to rest on a lawn outside a building adjoining the car park. The car park fronted the London Road, at Coalville, and the entrance to it was from the south, from the pavement of London Road. At the north west corner of the car park there was an opening of about fifteen feet abutting a private footpath leading to a bowling club and to allotment gardens; the footpath was habitually used by members of the club and allotment holders, who had to cross the car park to reach the path, but it was not habitually used by the general public. The car park was owned by the local authority and was open to all members of the public at all times for parking cars without payment. The respondent, who neither held a driving licence nor was insured against third-party risks, was charged with committing offences under s. 4 (1) and s. 35 of the Road Traffic Act, 1930, which, respectively, make it an offence to drive a motor vehicle without a licence, and to use a vehicle while uninsured, "on a road". Section 121 of the Act of 1930 defines road as meaning "any highway and any other road to which the public has access". The justices held that neither the car park as part of the private footpath, nor the car park itself, was a road within the meaning of the Act and dismissed the charges against the respondent. On appeal by the prosecutor,

Held: the car park was not a road within the meaning of s. 121 of the Road Traffic Act, 1930, because, viewed as part of the private footpath, the public had not access thereto, and, viewed as a car park proper, the

- A justices were entitled to find, as a finding of fact, that it was not a "road", and the court would not interfere with their decision.

Dicta of the Lord Justice-General, LORD CLYDE, in *Harrison v. Hill* (1932 S.C. (J.) at p. 16) applied.

Appeal dismissed.

- B [As to driving a motor vehicle elsewhere than on a road, see 31 HALSBURY'S LAWS (2nd Edn.) 673, para. 992.

For the Road Traffic Act, 1930, s. 121, see 24 HALSBURY'S STATUTES (2nd Edn.) 661.]

Cases referred to:

(1) *Harrison v. Hill*, 1932 S.C. (J.) 13; Digest Supp.

- C (2) *Heath v. Pearson*, [1957] Criminal Law Review 195.

Case Stated.

- This was a Case Stated by justices for the County of Leicester in respect of their adjudication as a magistrates' court sitting at the Court House, Coalville on June 17, 1958. On June 4, 1958, informations were preferred by the appellant, Henry Thomas Griffin, against the respondent, Judith Ann Squires alleging that on May 11, 1958, the respondent drove a motor vehicle on a road, namely, the car park adjoining London Road at Coalville, when she neither held a driving licence nor was insured against third-party risks, contrary to s. 4 (1) and s. 35 of the Road Traffic Act, 1930. The justices found the following facts: On May 11, 1958, the respondent who had never held a driving licence, with the owner's consent, drove a motor car from a stationary position on the car park for a distance of about ten yards in the course of which the car went through a privet hedge dividing the car park from the Municipal Buildings at London Road and came to rest on the lawn outside the buildings. The car park had a frontage to London Road of 123 feet and was about eighty feet deep. It was bounded on the east by a wall, on the west by a hedge and railings and on the north by a fence. At the north west corner of the car park there was an opening of fifteen feet abutting a private footpath which led to the premises of the Coalville bowling club and to council allotment gardens, and at the south side the car park was abutted by the pavement of London Road in the middle of which was a flower bed sixty-six feet long and eleven feet wide leaving entrances at either side which were twenty-one feet long and thirty-six feet long respectively. The car park was owned, and maintained at the public expense, by Coalville Urban District Council and all members of the public were allowed to use it at all times for the purpose of parking vehicles without payment. The footpath leading from the north west corner of the car park was a private path which belonged to the council but it was used by members of the bowling club and allotment holders who had to cross the car park to reach the footpath, although the bowling club could be reached by an alternative route.
- H For the appellant it was contended that the car park was a road within the meaning of s. 121* of the Road Traffic Act, 1930, therefore the respondent had contravened s. 4 (1) and s. 35* of the Act. The respondent contended that the car park was not a road within the meaning of the Act. The justices were of opinion that the private footpath was not a road within the Act of 1930 since although it was a road, it was not one to which the public, other than the members of the bowling club and allotment holders, had access, and, that the car park was not a road within the Act because, while the public had access to it, it was not "a line of communication between places for the use of foot passengers, riders and vehicles" which was the definition of "road" in the OXFORD DICTIONARY

* Section 4 (1) of the Road Traffic Act, 1930, provides: "A person shall not drive a motor vehicle on a road unless he is the holder of a licence . . ."; s. 35 provides that users of "a motor vehicle on a road" must be insured against third-party risks. Section 121 of the Act defines road as meaning "any highway and any other road to which the public has access".

accordingly, the justices dismissed the informations against the respondent. A
The question stated for the opinion of the High Court was whether, on the foregoing facts, the justices came to a correct decision in law.

Mrs. E. K. Lane for the appellant.

The respondent did not appear and was not represented.

LORD PARKER, C.J., having stated the facts as set out in the Case Stated, B
continued: The whole question here is whether the car park can be said to be a road within the meaning of the Road Traffic Act, 1930, s. 121, the relevant words being "highway and any other road to which the public has access". The justices decided that this car park was not a road within that definition and accordingly dismissed the informations.

Before coming to the question of the car park proper, I should mention that C
apart from parking cars certain people did cross this car park and go through the fifteen foot entrance to the north-west entrance which led to the bowling club and the council allotments. As I understand it, the justices have found that the general public did not habitually use the car park and the footpath to the bowling green and the council allotments but only the club members and the allotment holders. Accordingly, they came to the conclusion, with which D
I entirely agree, that it is impossible to say that this car park as a part of this footpath leading to the bowling green was a road. It was said in *Harrison v. Hill* (1) (1932 S.C. (J.) 13), a case in Scotland, by the Lord Justice-General, LORD CLYDE, that, as is quite clear, "road" means something other than a highway; in other words it is intended to include a wider class of road. He said this (*ibid.*, at p. 16): E

"It is plain, from the terms of the definition, that the class of road intended is wider than the class of public roads to which the public has access in virtue of a positive right belonging to the public, and flowing either from statute or from prescriptive user. A road may therefore be within the definition (1) although it belongs to the class of private roads, and (2) although all that can be said with regard to its availability to the public is that the public 'has access' to it." F

Then he goes on to say this (*ibid.*):

"I think that, when the statute* speaks of 'the public' in this connexion, what is meant is the public generally, and not the special class of members of the public who have occasion for business or social purposes to go to the . . ." G

premises in that case. Everything that LORD CLYDE said there applies absolutely to the car park as part of the footpath leading to the bowling green and allotments, and I think that the justices were perfectly right.

The second question is: Is the car park, as a car park, a road within the definition? One thing is perfectly clear; it is at any rate a place to which the public H
generally, to whom LORD CLYDE referred, have access and which they habitually use. Therefore, that part of the definition is amply fulfilled in this case. The question is: Is there anything else that remains to be fulfilled, in other words, is it enough if you find a place to which the general public have access to say that you then have a road within the definition, or must you have something which as a matter of common sense and ordinary meaning is a road? I
A number of cases have been referred to†. I do not propose to go through them. It has been said many times that it is eminently a question of fact for the justices to say whether a certain space is a road. Having decided that the general public have access to it they must then go further and ask: Is this place to which the

* The Road Traffic Act, 1930, s. 121.

† *Bugge v. Taylor*, [1941] 1 K.B. 198; *Thomas v. Dando*, [1951] 1 All E.R. 1010; *Bryant v. Marx*, (1932), 147 L.T. 499; *Buchanan v. Motor Insurers' Bureau*, [1955] 1 All E.R. 607.

- A public have access a road? On this matter I need only refer to quite a recent decision of this court in *Heath v. Pearson* (2) ([1957] Criminal Law Review 195). The facts are quite immaterial, but it was held, dismissing the appeal, that although the yard in question, Brunswick Yard, might well be a place to which the public had access, that was not enough to bring it within the definition of "road" in the Act* for it also had to be a road. The justices had found that
- B Brunswick Yard was not a road and, since the question whether or not a place was a road was primarily a question of fact, the court had no right, even if they had not agreed with it, to interfere with the justices' decision.

I think it was for the justices to decide as a question of fact whether this car park in the ordinary sense could be treated as a road. It seems to me that there must be a limitation of that sort, otherwise any place, as I have said, to which

- C the general public have access could be said to be a road within the definition. There was evidence on which the justices could come to that conclusion. It was eminently a matter for them, and I do not think that this court should interfere. I would dismiss the appeal.

- D **STREATFEILD, J.:** I agree, but I confess that I have experienced some reluctance in so doing, because as a matter of common sense it would be intolerable if ill-advised owners of motor cars parked on public car parks were to feel at liberty to let irresponsible young people with no licences try to drive their motor cars in a place where many other cars are collected; for in the course of so doing they might cause great damage to other vehicles and, by reason of the fact that they are uninsured, the policy of insurance would be vitiated and the insurance company would repudiate liability to the owners of vehicles which would have suffered damage. If the definition of the word "road" in the Act of 1930 was in line with that in the OXFORD DICTIONARY and described as a line of communication—whatever may be the position with regard to the private footpath leading from this public car park towards the bowling green and allotments, as to which I think the justices were quite right—I have no doubt
- E whatever that a public car park adjoining a public highway, there being two entrances from the highway on to the car park, is in fact a line of communication from either entrance to any point in that car park, both to and from. If that was the sole test I should undoubtedly come to the conclusion myself that the justices were wrong; but I have to give proper effect to the words in the Act of Parliament, where the offence consists in the act complained of being performed on a road and, by s. 121 of the Road Traffic Act, 1930, road means a
- G highway or other road to which the public has access. Although a car park is, in my opinion, a line of communication, I do not think that anybody in the ordinary acceptance of the word "road" would think of a car park as a road. If we were to hold that this was a road, a piece of waste land by the side of the road to which the public could resort for picnics would have also to be a road, and nobody would call that a road. I am, I think, confirmed somewhat in this
- H view when I look at s. 15 (1) of the Road Traffic Act, 1930, which deals with the punishment of persons for driving motor vehicles when under the influence of drink or drugs; in s. 15 (1) the phrase is:

"Any person who when driving or attempting to drive, or when in charge of, a motor vehicle on a road or other public place is under the influence of drink . . ."

- I There, clearly, the words "or other public place" are wide enough to embrace a car park such as we have described in this case. If it had been simply "on a road" it may be that a public car park would not be embraced by the word

* Viz., the Road Transport Lighting Act, 1927; the appellant had been acquitted by the justices on a charge of causing a motor vehicle to be on a road, Brunswick Yard during the hours of darkness without lights, contrary to s. 1 of the Act of 1927. The definition of "road" in s. 15 of that Act (now s. 17 of the Road Transport Lighting Act, 1957) is identical with the definition in s. 121 of the Road Traffic Act, 1930.

"road", but in s. 15 (1) there is that distinction between a road and another public place. Unfortunately, under this particular section, s. 4, the word is simply "road" and nothing else, and so in interpreting the word "road" in accordance with its definition in s. 121 I have, albeit with reluctance, come to the conclusion that it was open to the justices to find that this public car park was not a road. For that reason I agree that this appeal must fail.

DIPLOCK, J.: I agree that this appeal should be dismissed, and have nothing to add.

Appeal dismissed.

Solicitors: *Alfred Neale & Co.*, agents for *H. V. Jackson & Co.*, Leicester (for the appellant).

[*Reported by* **WENDY SHOCKETT**, *Barrister-at-Law.*]

LOCK v. LOCK (by her guardian).

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Mr. Commissioner Latey, Q.C.), October 27, 28, 1958.]

Divorce—Insanity—Incurable unsoundness of mind—Care and treatment for five years—Alcoholism—Voluntary patient without certification—Specialist's report—Matrimonial Causes Act, 1950 (14 Geo. 6 c. 25), s. 1 (1) (d)—Divorce (Insanity and Desertion) Act, 1958 (6 & 7 Eliz. 2 c. 54), s. 1 (1).

By s. 1 (1) of the Divorce (Insanity and Desertion) Act, 1958, a person is deemed to be under care and treatment for the purposes of s. 1 of the Matrimonial Causes Act, 1950 "at any time when he is receiving treatment for mental illness—(a) as a resident in a hospital . . ."

In March, 1951, the wife was removed to a mental hospital by virtue of a "three day" order under s. 20 of the Lunacy Act, 1890, and at the expiry of the order she was detained for a further period not exceeding fourteen days pursuant to s. 21A of that Act. Before the expiry of the second order she became a voluntary patient and she had ever since been receiving treatment for mental illness as a resident in a hospital. At the end of 1956 the husband petitioned for divorce under s. 1 (1) (d) of the Matrimonial Causes Act, 1950. In evidence the medical superintendent of the hospital stated that the wife was suffering from dementia and that no further improvement was possible, but that in his view she should not be certified. In accordance with the usual practice, the Official Solicitor as guardian ad litem for the wife obtained a report by a specialist as to the wife's condition. By consent of counsel this report was put in evidence: in the report the specialist stated that in the light of present-day medical knowledge the wife was incurably of unsound mind.

Held: the husband would be granted a divorce since (i) by the Divorce (Insanity and Desertion) Act, 1958, s. 1, care and treatment for the purposes of s. 1 (1) (d) of the Act of 1950 included care and treatment as a voluntary patient for five years without certification and (ii) on the facts, the wife was incurably of unsound mind (*Randall v. Randall*, [1938] 4 All E.R. 696, applied).

[As to incurable unsoundness of mind, see 12 HALSBURY'S LAWS (3rd Edn.) 278, para. 536, note (g); and for cases on the subject, see 27 DIGEST (Repl.) 368, 3048, 3049.

For the Matrimonial Causes Act, 1950, s. 1 (2), see 29 HALSBURY'S STATUTES (2nd Edn.) 390.

- A** For the Divorce (Insanity and Desertion) Act, 1958, s. 1, see HALSBURY'S STATUTES INTERIM SERVICE 511.]

Case referred to:

- (1) *Randall v. Randall*, [1938] 4 All E.R. 696; [1939] P. 131; 108 L.J.P. 49; 160 L.T. 133; 27 Digest (Repl.) 368, 3049.

B **Petition.**

The husband petitioned for divorce under the Matrimonial Causes Act, 1950, s. 1 (1) (d).

The parties were married in 1926 and there were three children. In 1951 the parties were in the Far East and according to the evidence of the husband, the wife, who had become addicted to alcohol, had to be sent back to England.

- C** On Mar. 9, 1951, the wife was admitted to Roundway Hospital under an order made by the duly authorised officer under the Lunacy Act, 1890, s. 20, as amended. On Mar. 12, 1951, on the expiry of that order, the wife was detained in the hospital by virtue of a certificate of the medical officer pursuant to s. 21A of the Act of 1890, as amended. On Mar. 18, 1951, she became a voluntary patient and remained at the same hospital until July 24, 1951. On that date
- D** she was admitted as a voluntary patient to Tone Vale Hospital where she had remained ever since.

On Dec. 3, 1956, the husband presented a petition for divorce in which he alleged:

- E** "That the [wife] is incurably of unsound mind and has been continuously under care and treatment for a period of at least five years immediately preceding the presentation of this petition . . ."

The husband prayed for the exercise of the court's discretion in his favour. The wife, by her guardian ad litem, in answer denied that she had been continuously under care and treatment (within the meaning of s. 1 (2) of the Matrimonial Causes Act, 1950) and denied that she was incurably of unsound mind.

- F** *R. F. Ormrod, Q.C.*, for the husband.

J. P. Comyn for the Official Solicitor as guardian ad litem for the wife.

Cur. adv. vult.

- Oct. 28. **MR. COMMISSIONER LATEY, Q.C.**, read a judgment in which he referred to the pleadings and to s. 1 (2) of the Matrimonial Causes Act, 1950*, and continued: As the pleadings stood, counsel for the Official Solicitor was prepared to ask the court if the original three days order made on Mar. 9, 1951, could or could not be regarded as an order within the meaning of the Matrimonial Causes Act, 1950. Since incurable unsoundness of mind was introduced as a ground for divorce by the Matrimonial Causes Act, 1937, there have been a number of judicial interpretations of what constitutes an order under
- H** the Lunacy and Mental Treatment Acts, but it is unnecessary in this case for me to decide this point because a new Act has been passed with the object of doing away with much of the technical bars to a petitioner's remedy in divorce which have existed up to now. This is the Divorce (Insanity and Desertion) Act, 1958, which was passed and came into force on July 23, 1958. Section 1 provided, *inter alia*, that a person should be deemed to be under care and treat-
- I** ment for the purposes of s. 1 of the Matrimonial Causes Act, 1950,

" . . . at any time when he is receiving treatment for mental illness—(a) as a resident in a hospital or other institution provided, approved, licensed,

* Section 1 (2) reads as follows: "For the purposes of this section a person of unsound mind shall be deemed to be under care and treatment—(a) while he is detained in pursuance of any order . . . under the Lunacy and Mental Treatment Acts, 1890 to 1930 . . . (d) while he is receiving treatment as a voluntary patient under the Mental Treatment Act, 1930 . . . being treatment which follows without any interval a period during which he was detained as mentioned in para. (a) . . . of this sub-section; and not otherwise."

registered or exempted from registration by any Minister or other authority in the United Kingdom, the Isle of Man or the Channel Islands . . .”

Counsel for the husband submits, and counsel for the Official Solicitor agrees, that this general definition of “care and treatment” avoids the objection raised in the answer. There is no doubt in my mind that that is the effect of the new section.

In all these cases, however, the court has to be assured that the patient is incurably of unsound mind within the meaning of the Matrimonial Causes Act, 1950, and usually that assurance is given by the medical superintendent of the particular hospital, or his deputy. In the present case, however, the medical superintendent at Tone Vale Hospital felt some qualms about this, having regard to the question whether a voluntary patient like the wife in the present case was necessarily of unsound mind. This point under the new Act by which care and treatment as a voluntary patient for five years without any certification facilitates a divorce on the ground of incurable unsoundness of mind is clearly a matter of public importance, and I felt that I must consider it before giving judgment.

[The commissioner stated the facts and continued:] The medical superintendent gave medical evidence of certain ill effects on the wife’s brain as the result of alcoholism and of her delusions as to persecution and thefts, but said that her mental condition improved, so that in 1952 he suggested that her husband should have her home under supervision. But the husband, with three children to look after with the aid of his housekeeper, did not see his way to accept the suggestion. The medical superintendent said that she was suffering from dementia and no further improvement was possible, though he did not think that she should be certified. That course, I may say, is usually considered necessary when a patient becomes a danger to himself or others, or he is absolutely non compos mentis and helpless. In this case, as a voluntary patient, the wife must be considered at the present moment to have volition to stay in or leave the institution. Again, in all these cases where the Official Solicitor represents a patient, both in the latter’s and the public interest, a specialist’s report is always obtained on the patient’s condition. By consent of both counsel I have seen the report of a well-known psychiatrist. He reported that the patient had become a feeble-minded and childish person. She made unfounded accusations of theft, had no memory for anything, could not concentrate on any occupation, was quarrelsome, and aggressive, her speech was slurred and her gait shuffling. In his opinion she needed much nursing attention, and in the light of present-day medical knowledge was incurably of unsound mind.

There is no statutory definition of this formula in the Act. When this jurisdiction started in the hands of SIR BOYD MERRIMAN, P., he decided that it must be given a wide interpretation and decided on the facts of each case, and in *Randall v. Randall* (1) ([1938] 4 All E.R. 696), which has been cited to me, his Lordship gave cogent reasons for this view. Though doctors may differ as to what is unsoundness of mind and whether or not it is incurable, it is for this court to follow the terminology of the statute and judicial authority thereon. I, therefore, find on the facts in the present case that the wife is incurably of unsound mind, and having been for upwards of five years before the petition under care and treatment as defined in the Act of 1958, I pronounce a decree nisi of divorce in the exercise of my discretion.

Finally, perhaps I ought to point out that, having regard to the recent policy of extending the range of voluntary patients and decertifying certified patients, it may well be that a large proportion of mental patients, whether voluntary or even certified, do not come under the category of persons incurably of unsound mind within the meaning of the Act. Each case of divorce in this class must be considered on its merits. I ought also to add that it is not customary for the report of the specialist deputed on behalf of the Official Solicitor to examine

A the patient to be put in evidence, but in view of the fact that, so far as I know, this is the first case which falls to be decided under the new Act, and owing to the peculiar circumstances, I thought it right to see that report and, indeed, to strengthen my judgment with its contents.

Decree nisi.

B Solicitors: *Gregory, Rowcliffe & Co.*, agents for *Risdon, Weston, Witham & Hancock*, Williton (for the husband); *Official Solicitor*.

[*Reported by A. T. HOOLAHAN, Esq., Barrister-at-Law.*]

C BERNARD v. BERNARD (SUTTON cited).
BERNARD v. BERNARD.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Barnard, J.), October 13, 17, 1958.]

D *Divorce—Estoppel—Adultery—Desertion—Repetition of admitted charge of adultery—Repetition of charge of desertion—No finding on issue of desertion in earlier proceedings.*

E In July, 1952, the husband presented a petition for divorce on the grounds of adultery with S. and desertion, and prayed for the exercise of the court's discretion in his favour. The suit was heard undefended on Mar. 31, 1953, and during the course of the hearing the trial judge said that he had no doubt that the wife had committed one act of adultery with S., but the judge did not express any opinion on the charge of desertion. No judgment was delivered. The order drawn up recited that the husband "had sufficiently proved the contents of the petition" and that the court refused to exercise its discretion in his favour and rejected the prayer of the petition.

F The wife was given leave to file an answer, and she admitted the one act of adultery with S., but denied desertion; and she cross-prayed for a divorce in the exercise of the court's discretion. On June 14, 1955, on the wife's application, the petition was dismissed with the husband's consent. On Feb. 1, 1956, the wife presented a petition for divorce on the ground of the husband's adultery and prayed for the exercise of the court's discretion in her favour. By his answer the husband admitted in part the adultery alleged and made cross-charges against the wife of desertion

G (the particulars whereof were substantially the same as those pleaded in the husband's petition in July, 1952) and adultery with S. The wife in reply (a) denied desertion and alleged that the husband was estopped from repeating that charge on the ground that it had been adjudicated on and rejected by the court in the earlier proceedings, and (b) admitted the adultery with S. and alleged that the husband was estopped from repeating

H that charge since, although it had been admitted by the wife, the court had refused to grant a decree in the earlier proceedings. The husband in rejoinder alleged that desertion had been proved in the earlier proceedings and that the wife was estopped from denying that charge. On the preliminary issues (i) whether the husband should be estopped from making the allegations of desertion and of adultery with S. and (ii) whether the wife should be estopped from denying desertion,

I

Held: the husband was not estopped from repeating against the wife the charge of adultery with S., since the husband had succeeded on that charge in the former suit; neither was he precluded from alleging again the charge of desertion against the wife, since it had not been adjudicated on in the former suit, and it was open also to the wife to deny the charge in the present proceedings.

Hall v. Hall & Richardson ((1879), 48 L.J.P. 57) applied.

Observations of DENNING, L.J., in *Thompson v. Thompson* ([1957] 1 All E.R. at p. 165) considered.

[As to estoppel as a bar in divorce, see 12 HALSBURY'S LAWS (3rd Edn.) 277, para. 533, note (t), 294, para. 581; 15 HALSBURY'S LAWS (3rd Edn.) 183, para. 356; and for cases on the subject, see 27 DIGEST (Repl.) 375, 376, 3089-3098.]

Cases referred to:

- (1) *Hall v. Hall & Richardson*, (1879), 48 L.J.P. 57; 40 L.T. 525; 27 Digest (Repl.) 376, 3101.
- (2) *Thompson v. Thompson*, [1957] 1 All E.R. 161; [1957] P. 19; 3rd Digest Supp.

Issue.

In a petition for divorce dated July 24, 1952, the husband alleged (i) that the wife had committed adultery with one Sutton, the co-respondent, in particular on Mar. 2, 1947, at a certain hotel and (ii) that the wife had deserted the husband. Particulars of desertion were set out in the petition. The husband prayed for the exercise of the court's discretion in his favour. The suit was undefended and was heard by His Honour JUDGE HOWARD, sitting as a commissioner in divorce, on Mar. 31, 1953. The order drawn up on that date recited that:

"The commissioner having heard the oral evidence of the [husband] in support of the petition . . . and having heard counsel for the [husband] thereon, the [wife] appearing by counsel on the question of custody but not otherwise defending the suit at the hearing, the co-respondent not defending the suit at the hearing, pronounced that the [husband] had sufficiently proved the contents of the petition, refused the exercise of the discretion conferred on the court by the Matrimonial Causes Act, 1950, s. 4, and rejected the prayer of the petition. And it is further ordered that the [wife] be at liberty to amend her limited appearance filed herein to a general appearance, that the [wife] be at liberty to file an answer . . . and that the [husband] be at liberty to file a reply . . . And it is further ordered that the cause be stayed pending renewal of the registrar's certificate . . ."

On Apr. 28, 1953, the wife filed an answer in which she admitted the one act of adultery with the co-respondent Sutton at the hotel and denied desertion; she then cross-prayed for divorce on the ground of the husband's adultery and prayed for the exercise of the court's discretion in her favour. No reply was filed by the husband and on June 14, 1955, on the wife's application, Mr. Registrar FORBES ordered that by consent the petition be dismissed.

On Feb. 1, 1956, the wife presented a petition for divorce on the grounds of the husband's adultery with two named women, and she prayed for the exercise of the court's discretion in her favour. On Dec. 31, 1956, the husband filed an answer in which he admitted in part the adultery charged. He then alleged in para. 4 that the wife had deserted him, and the particulars were in essence the same as those in the husband's petition dated July 24, 1952; in para. 6 he alleged that she had committed adultery with Sutton, in particular on Mar. 2, 1947, at a certain hotel, and also with a man unknown. The husband prayed for the exercise of the court's discretion in his favour. On Feb. 6, 1957, the wife filed a reply in which she denied desertion and alleged:

"2. That the said allegation of desertion was previously made by the [husband] in his petition for divorce [dated July 24, 1952] and was adjudicated on by this Honourable Court and rejected and the [husband] is not now entitled to repeat such allegation."

The wife admitted the adultery with Sutton and alleged:

"4. That the said allegation of adultery was previously made by the

A [husband] in his said previous petition for divorce and although admitted by the [wife] this Honourable Court refused to grant a decree of dissolution on the grounds of such adultery and the [husband] is not now entitled to repeat such allegation."

The wife then denied the charge of adultery with a man unknown.

B On Feb. 17, 1958, WALLINGTON, J., on the wife's summons ordered the following issues to be tried:

C "1. Whether the [husband] be estopped from making the allegation of desertion in para. 2 of his answer and the allegation of adultery in para. 6 of his answer by reason of the decision of His Honour JUDGE HOWARD sitting as a commissioner on Mar. 31, 1953. 2. Whether the [wife] be estopped from denying desertion prior to July 24, 1952, by reason of the said decision of Mar. 31, 1953."

The second issue was raised at the hearing before WALLINGTON, J., and on Feb. 24, 1958, the husband filed a rejoinder alleging that:

D "The [wife] was by the order . . . dated Mar. 31, 1953, found to have deserted the [husband] without just cause for a period of three years and upwards prior to July 24, 1952. The [wife] is, in the premises, estopped from denying that she had deserted the [husband] without just cause at any time prior to Mar. 31, 1953."

F. J. Cridlan for the wife.

J. G. St. G. Symes for the husband.

E *Cur. adv. vult.*

Oct. 17. **BARNARD, J.**, stated the facts and continued: Counsel for the wife relies on the order dated June 14, 1955, as creating an estoppel. I do not think that will do. That order does not show on the face of it that there has been any hearing, it does not show that any charges have been established or that any charges have failed to be established, and on that argument one F has only to look at *Hall v. Hall & Richardson* (1) ((1879), 48 L.J.P. 57), a decision of Sir JAMES HANNEN, P. That was a case in which a husband had filed a petition for divorce and later the petition was dismissed before hearing on the then petitioner's application and with the consent of the respondent and co-respondent. Later he filed a fresh petition which included the same charges of adultery, and Sir JAMES HANNEN held that he was not precluded G by the dismissal of the first petition from repeating those charges, because they had never been adjudicated on.

The facts of the present case are different, and it is only fair to counsel for the wife to say that he was not solely relying on that order. He referred me to the only other case to which I need refer to in this judgment, *Thompson v. Thompson* (2) ([1957] 1 All E.R. 161), and he relies very strongly on what H DENNING, L.J., said in the course of his judgment dealing with this question of estoppel. DENNING, L.J., says ([1957] 1 All E.R. at p. 165) dealing with divorce:

I "The situation has been neatly summarised by saying that in the Divorce Court 'estoppels bind the parties but do not bind the court': but this is perhaps a little too abbreviated. The full proposition is that, once an issue of a matrimonial offence has been litigated between the parties and decided by a competent court, neither party can claim as of right to re-open the issue and litigate it all over again if the other party objects (that is what is meant by saying that estoppels bind the parties) . . ."

I feel convinced that DENNING, L.J., did not intend what he said to be construed so widely as to preclude a party who has made a charge and succeeded in proving it, from repeating it. A few passages only in the rest of his judgment

have only to be looked at to see that he never intended this passage to bear such a wide interpretation as that. A

Before I refer to those other passages I might say that it is clear that if one assumes that the husband had put forward this charge of adultery and had failed to prove it, the rule of estoppel would apply; but, here, he is making a charge of adultery which was admitted by the wife and on which he succeeded. It is repeated in the present proceedings and again admitted by the wife. Unfortunately, the case before His Honour JUDGE HOWARD being undefended, there was no judgment, and the order only says that the contents of the petition were sufficiently proved. I have, however, a transcript of what took place before the commissioner. Referring to a letter which was put in the commissioner says: B

"I have no doubt that the [wife] has committed adultery, as she says, one single slip. We do not have any more information than that." C

Then he went on to say that it was a bad case and to ask why should he exercise his discretion in the husband's favour. Nowhere in this transcript do I find a single word from the commissioner showing whether he was satisfied that the charge of desertion was proved or whether he was satisfied that it was not proved. Putting aside the question of discretion, once the husband had proved an act of adultery he was *prima facie* entitled to a divorce. I myself have often asked counsel why he is going on with another charge since I am unable to give two divorces or an extra special decree. It would have been a sheer waste of time going on with the other issue. D

DENNING, L.J., makes clear what he meant by that statement in his judgment which I have already read, because he says this ([1957] 1 All E.R. at p. 165): E

"Such being the principles, let me show how they have been applied. The cases fall into three categories. The first category consists of those cases where a charge of a matrimonial offence has been established in previous proceedings. One party has been found guilty. In such a case, as between the parties, the strict rules of *res judicata* would seem to apply; but the Divorce Court, being bound by no estoppels, often allows a departure from them. The best illustration is where a party has obtained a decree of judicial separation on the ground of cruelty and follows it up with a petition for divorce on the same ground." F

There a successful party merely repeats a charge on which he has succeeded. Counsel for the husband gave me another example: if a husband were to file a petition for divorce charging adultery and the wife pleaded condonation, the court might find the adultery proved and at the same time find that it was condoned and dismiss the petition. If later on the parties came together again, something might arise which would amount to a revival; the husband could not be estopped from repeating the charge of adultery on which he had succeeded and then alleging that it had been revived and he was therefore entitled to a divorce; and I think it is clear that DENNING, L.J., never meant what he was saying to apply to someone repeating a charge which he had proved. DENNING, L.J., then goes on (*ibid.*, at p. 166): G H

"The second category is where a charge of a matrimonial offence has been made unsuccessfully in the *High Court*. The charge has failed and the accused person has been acquitted. The complainant then repeats the charge in a subsequent suit for divorce. The court will not as a rule allow him to do this." I

Then the third category, with which I need not deal in detail, is where there has been a finding before the justices and the Divorce Court does not consider itself bound by any rule of estoppel. I am therefore satisfied that the husband is not estopped from repeating this charge of adultery.

- A** As regards the charge of desertion, counsel for the wife says that I ought to imply that the commissioner rejected the charge of desertion and found it not proved. Counsel for the husband, on the other hand, says that I ought to imply that the commissioner accepted the husband's evidence and that the facts proved established desertion and therefore the wife ought not to be allowed to deny it again. I am not prepared to imply anything either way. There is
- B** nothing in the transcript which shows that the commissioner was either satisfied that desertion was proved or that he was not satisfied that desertion was proved. There was no adjudication on the charge of desertion, and therefore it is open to the husband to make that charge again and it is also open to the wife to deny such charge. I have, therefore, come to the conclusion that the answers to the questions in issue are both in the negative.

C

Order accordingly.

Solicitors: *Callingham, Griffith & Bate*, agents for *Varley, Hibbs & Co.*, Coventry (for the wife); *Wainwright & Co.* (for the husband).

[*Reported by A. T. HOOLAHAN, ESQ., Barrister-at-Law.*]

D

Re TARNPOLSK (*deceased*). BARCLAYS BANK, LTD.
AND ANOTHER v. HYER AND OTHERS.

E [CHANCERY DIVISION (Danckwerts, J.), October 23, 1958.]

Will—Condition—Condition precedent or qualification—Certainty—Gift on marriage to person of “Jewish race”—Validity.

By his will dated June 17, 1942, a testator made gifts to his grandchildren on their respective marriages. The testator further provided that for the purposes of his will “the expression ‘marry’ shall mean marry according to the rites of the Jewish faith a person of Jewish race and religion and the word ‘marriage’ has a corresponding meaning”. On July 27, 1943, the testator died.

F

Held: the gifts expressed to be given on marriage were invalid because it was impossible to give sufficient meaning to the term “Jewish race” to enable it to be said whether or not a given person complied with the condition precedent or qualification, which, therefore, failed for uncertainty, causing the gifts to which it was attached also to fail.

G

Re Allen ([1953] 2 All E.R. 898) distinguished.

Dictum of LORD ROMER in *Clayton v. Ramsden* ([1943] 1 All E.R. at p. 22) applied.

H

[As to uncertainty in a will, see 34 HALSBURY'S LAWS (2nd Edn.) 109, 219-222, paras. 143, 274-277; and for cases on the subject, see 44 DIGEST 440-444, 609-611, 612, 613, 2667-2687, 4366-4385, 4393-4400.]

Cases referred to:

- (1) *Re Allen, Faith v. Allen*, [1953] 1 All E.R. 308; [1953] Ch. 116; *reversd.* C.A., [1953] 2 All E.R. 898; [1953] Ch. 810; 3rd Digest Supp.
- (2) *Clayton v. Ramsden*, [1943] 1 All E.R. 16; [1943] A.C. 320; 112 L.J.Ch. 22; 168 L.T. 113; 2nd Digest Supp.
- (3) *Re Sonn* (Oct. 16, 1958), Unreported.
- (4) *Re Wolffe's Will Trusts, Shapley v. Wolffe*, [1953] 2 All E.R. 697; 3rd Digest Supp.

I

Adjourned Summons.

The plaintiffs, the trustees of the will and codicil of Israel Tarnpolsk, deceased, by their originating summons dated Feb. 14, 1958, asked for the determination, among others, of the following questions: (i) whether on the true construction

of the will the legacies bequeathed to the testator's grandchildren on marriage according to the rites of the Jewish faith to a person of Jewish race and religion were valid bequests or were void for uncertainty or for some other reasons; (ii) if the said legacies were valid, an inquiry whether any of the defendants had or had not married according to the rites of Jewish faith a person of Jewish race and religion. A

M. W. Cockle for the plaintiffs, the trustees. B

K. J. T. Elphinstone for the first and second defendants, grandchildren of the testator.

A. J. Balcombe for the fifth, sixth and seventh defendants, grandchildren of the testator.

The third and fourth defendants did not appear and were not represented. C

DANCKWERTS, J.: In this case the testator, who died on July 27, 1943, has created difficulty by the terms of his will, which is dated June 17, 1942. The only material part of the will is cl. 12, where he directed, referring to the trusts of his residual estate, that the trustees should

"stand possessed of the trust fund and the accumulations thereof and the income of the same respectively in trust in the first place to pay to each of my children who may be in need of pecuniary assistance from time to time [specified sums] and in the second place to pay to or apply for the benefit of each grandson of mine on my death if married, if unmarried on his marriage within twenty-one years of my death, the sum of £250 and to pay to or apply for the benefit of each grand-daughter of mine on my death if married, if unmarried on her marriage within twenty-one years of my death, the sum of £500 as an extra wedding present and in the third place to stand possessed of the residue of the said trust fund and accumulations and the income thereof upon trust for such of my grandchildren as shall be living at the expiration of twenty-one years from my death and the children or child then living of any then deceased grandchild of mine who respectively being male attains the age of twenty-one or being female attain that age or marry under that age and if more than one in equal shares." D

Then there is a further provision about the children of the deceased grandchild, which I need not read. The testator continued: E

"For the purposes of this my will the expression 'marry' shall mean marry according to the rites of the Jewish faith a person of Jewish race and religion and the word 'marriage' has a corresponding meaning No child of any deceased grandchild of mine whose parent is born after my death shall be entitled to a share in my estate." F

The question is whether those provisions, which are plainly either conditions precedent or qualifications on which certain sums of money may be payable to grandsons or grand-daughters, are valid and effective. H

It is argued that the matter is decided by *Re Allen, Faith v. Allen* (1) ([1953] 2 All E.R. 898). In that case, a testator devised certain freeholds, after life interests, to the eldest of the sons of his nephew F. "who shall be a member of the Church of England and an adherent to the doctrine of that Church", with a gift over. *VAISEY, J.*, held that the terms of the gift were void for uncertainty, but it was held by a majority in the Court of Appeal, *ROMER, L.J.*, dissenting, that the gift was not void for uncertainty. It was said that the formula was not a condition subsequent, where the clarity had to be such that the exact event which would cause the gift to be divested had to be apparent from the outset. That this was a condition precedent, or a qualification and, to satisfy it, it was not necessary that its scope should be capable of exact definition, but that all that a claimant had to show was that he, at least, was within the requirement. That membership of the Church of England comprised wide differences of degree, but was an I

A intelligible qualification of the class of intended beneficiaries, and though it might be difficult to say of some persons whether they were or were not members, that did not of necessity render it impossible for a particular individual to establish that he was a member, and he ought not to be debarred from attempting to show that he fulfilled the qualification. Then there was a similar discussion in regard to the meaning of the words "an adherent to the doctrine of the Church of England". In my view, the qualification laid down by the Court of Appeal in *Re Allen* (1) is to be considered with regard to the words "of necessity". In the present case there seems to me to be a difficulty which renders it impossible for a possible candidate to show with reasonable certainty that he satisfies the test which the testator has attempted to lay down. It seems to me that "religion" and "faith" are interchangeable words, but that the words which cause a difficulty here are "a person of Jewish race". I find great difficulty in seeing what exactly "a person of Jewish race" means. The passage in the speech of LORD ROMER in *Clayton v. Ramsden* (2) ([1943] 1 All E.R. 16), shows the difficulties with which anybody is faced in trying to decide whether that qualification has been satisfied. LORD ROMER said (*ibid.*, at p. 22):

D "What then did the testator mean by the stipulation that the daughter's husband was to be of Jewish race or descent? It cannot reasonably be supposed that the husband was to show an unbroken line of descent from the patriarch Jacob. If the daughter were compelled to wait for such a husband, she would remain a spinster all her life and the condition would be void as amounting to a total restraint on marriage. It seems far more probable that the testator meant no more than that the husband should be of Hebraic blood. But what degree of Hebraic blood would a permissible husband have to possess? Would it be sufficient if one only of his parents were of Hebraic blood? If not, would it be sufficient if both were? If not, would it be sufficient if in addition it were shown that one parent was of Hebraic blood or must it be shown that this was true of all his grandparents? Or must the husband trace his Hebraic blood still further back? These are questions to which no answer has been furnished by the testator. It is, therefore, impossible for the court to see from the beginning precisely or distinctly upon the happening of what event it is that Mrs. Clayton's vested interests under the will were to determine, and the condition is void for uncertainty."

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G The last sentence, of course, was referring to the condition subsequent which was to be found in the will in *Clayton v. Ramsden* (2), but it seems to me that the same difficulties apply where there is a qualification and one cannot say what the qualification is. It was a difficulty to which I referred in my decision in *Re Sonn* (3) on Oct. 16, 1958 (unreported), and it is the difficulty which was apparent to HARMAN, J., in *Re Wolffe's Will Trusts, Shapley v. Wolffe* (4) ([1953] 2 All E.R. 697).

H Since one cannot give sufficient meaning to the words used by the testator to say that here is a qualification which in any given case has been fulfilled, the result must be, in my view, that the qualification is void and that nobody can satisfy the terms of the gift which, therefore, is invalid.

Declaration accordingly.

Solicitors: *Teff & Teff* (for the plaintiffs); *Bulcraig & Davis* (for the first and second defendants); *M. Landy* (for the fifth, sixth and seventh defendants).

_[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

GODDARD v. MINISTER OF HOUSING AND LOCAL GOVERNMENT AND ANOTHER.

[QUEEN'S BENCH DIVISION (Lord Parker, C.J.), October 30, 1958.]

Housing—Clearance area—“Resources” of council—Requirement that local authority should be satisfied of the sufficiency of their resources before declaring clearance area—Validity of resolution and of subsequent compulsory purchase order—Housing Act, 1957 (5 & 6 Eliz. 2 c. 56), s. 42 (1), proviso (ii), Sch. 4.

Section 42 of the Housing Act, 1957, confers power on a local authority to declare an area in their district to be a clearance area and provides, among other matters, that before a resolution declaring a clearance area may be passed “the authority shall satisfy themselves . . . (ii) that the resources of the authority are sufficient for the purpose of carrying the resolution into effect”. A local authority's resolution stated that reports of meetings of their housing committee and finance committee had been considered and that it was resolved that, where necessary, such reports as varied by the adopted amendments should be approved and adopted as minutes of the council. The report of the housing committee contained a passage following the wording of s. 42 (1) so far as material and recommending that the council should declare certain areas, including land of the applicant, to be clearance areas. The report of the finance committee stated that the committee had considered the financial aspect of the recommendations and concurred with the proposal of the housing committee. A compulsory purchase order was made and confirmed in relation to the applicant's land. Under Sch. 4, para. 2, of the Housing Act, 1957, the applicant applied for the compulsory purchase order to be quashed on the ground that the local authority had not been satisfied of the sufficiency of their resources within s. 42 (1) proviso (ii) so that the clearance resolution was invalid. The chairman of the housing committee deposed that his committee had considered whether, and were satisfied that, the resources of the local authority were sufficient. The redevelopment of the clearance area was such as would involve large sums, possibly £550,000, and there was evidence that no specific figures of expenditure were before the council.

Held: it was competent to the local authority without having specific figures before them to be satisfied that their resources were sufficient for carrying the clearance resolution into effect; the local authority, acting through the committees of the council and on their advice, had been satisfied of the sufficiency of their resources (which included the authority's credit as well as their cash resources), and the compulsory purchase order would not be quashed.

Dictum of SWIFT, J., in *Re Bowman* ([1932] All E.R. Rep. at p. 262) approved.

Per CURLIAM: in deciding whether to declare an area to be a clearance area a local authority are not concerned to satisfy themselves that their resources are sufficient for the whole contemplated redevelopment, if they propose that they themselves should do the redevelopment (cf. p. 486, letter A, post).

[As to the declaration of clearance areas, see 19 HALSBURY'S LAWS (3rd Edn.) 639, para. 1032; as to the quashing of clearance orders, see *ibid.*, p. 645, para. 1042; and as to the quashing of compulsory purchase orders, see *ibid.*, p. 656, para. 1056, text and note (m).]

For the Housing Act, 1957, s. 42, s. 43 (2) and Sch. 4, see 37 HALSBURY'S STATUTES (2nd Edn.) 354-356 and 475.]

Case referred to:

- (1) *Re Bowman, South Shields (Thames Street) Clearance Order, 1931*, [1932] All E.R. Rep. 257; [1932] 2 K.B. 621; 101 L.J.K.B. 798; 147 L.T. 150; 96 J.P. 207; Digest Supp.

A Motion.

This was an application by Mr. Wilton Joseph Goddard to quash a compulsory purchase order which had been made by the Brentford and Chiswick Borough Council and confirmed by the Ministry of Housing and Local Government on Apr. 22, 1958. The ground of the application was that the resolution of the council declaring the area to be a clearance area was not within the powers of the Housing Acts, 1936 to 1956, and the Housing Repairs and Rents Act, 1954, or the Housing Act, 1957, in that a condition precedent to the making of the order was not performed. The condition was that before passing the resolutions of Apr. 16 and July 30, 1957, which declared part of the land included in the order to be clearance areas, the Brentford and Chiswick Borough Council should have satisfied themselves that their resources were sufficient for the purpose of carrying the resolution into effect. The facts appear in the judgment.

W. G. Wingate and *Q. T. Edwards* for the applicant, Mr. Goddard.

Rodger Winn for the respondents, the Minister of Housing and Local Government and the Brentford and Chiswick Borough Council.

D LORD PARKER, C.J.: The application is made under the powers given in Sch. 4 to the Housing Act, 1957, the material words in para. 2 for this purpose being:

“ If any person aggrieved by such an order as aforesaid [that is, a compulsory purchase order] desires to question the validity thereof on the ground that it is not within the powers of this Act or that any requirement of this Act has not been complied with, he may . . . make an application for the purpose to the High Court . . . ”

The court, if satisfied that the order was not within the powers of the Act, may quash the order generally, or in so far as it affects any property of the applicant.

The compulsory purchase order in question was confirmed on Apr. 22, 1958, and published on May 9, 1958. It was one of five compulsory purchase orders made by the council for the development or redevelopment of a site at Brentford, and covered land coloured grey on the plan put in, which included premises owned by the applicant, who there carried on the business of a retail electrician and electrical engineer. The council, pursuant to their powers under the Housing Acts, declared certain areas, including this area of grey land, to be a clearance area. The authority for that is to be found in s. 42 (1) of the Housing Act, 1957, which provides, stating it quite shortly, that a local authority, if satisfied that houses in the area are unfit for human habitation, and on a number of other matters,

“ . . . shall pass a resolution declaring the area so defined to be a clearance area, that is to say, an area to be cleared of all buildings in accordance with the subsequent provisions of this Part of this Act.”

H Having done that, they must immediately, or, to use the words of the Act, “ so soon as may be ”, take one of two steps; either they must make clearance orders calling on the owners of the houses in question to pull down those houses, or they may make compulsory purchase orders in order that they may by themselves or by contractors, demolish the buildings. In this case, the compulsory purchase order with which I am concerned was the result of two declarations of clearance areas, one in April and one in July, 1957. As a result of those clearance declarations having been made, the council made what I refer to as a draft compulsory purchase order including the houses within that clearance area, and such further areas as it was reasonably necessary to secure for the convenient development of the whole site (under s. 43 (2)), and thereafter the usual procedure of objections and public hearing took place, a report was made to the Minister, and ultimately, on Apr. 22, 1958, the draft compulsory purchase order was confirmed.

The grounds of challenge of the validity of the order concerned the question whether a condition in s. 42 (1) precedent to the making of the declaration of a

clearance area was fulfilled. It is convenient to say at the outset that if it was not, it is admitted by counsel for the respondents that the compulsory purchase order as confirmed was not within the powers of the Act, and would accordingly fall to be quashed. The condition is, reading the material words of the proviso to s. 42 (1):

"Provided that, before passing any such resolution [that is, declaring an area to be a clearance area] the authority shall satisfy themselves . . . (ii) that the resources of the authority are sufficient for the purpose of carrying the resolution into effect."

Counsel for the applicant puts forward broadly two contentions in this case. He says that the council, who are the authority in question, never did apply their minds to the question at all; secondly that, if they did, they either had no sufficient evidence which entitled them to be satisfied, or no evidence at all, or that they in some way misdirected themselves in consideration of the matter. The words, as I said, are "Provided . . . the authority shall satisfy themselves", and it is not for this court to consider what decision the court might have come to themselves if faced with the question. This court is merely charged with the duty of seeing that the council has not acted arbitrarily, and that it has acted bona fide.

For myself, I would adopt the words of SWIFT, J., in *Re Bowman, South Shields (Thames Street) Clearance Order, 1931* (1) ([1932] All E.R. Rep. 257). Having stated the general proposition that this court will not interfere, he goes on (*ibid.*, at p. 262):

"It may well be that there is a case, which is certainly not this case, in which it can be said that there was no material, there was no information and no representation before the local authority upon which they could, as reasonable people, possibly be satisfied that a clearance order ought to be made."

Counsel for the applicant says this is a case which comes within that principle, and the first way in which he puts it is this. He says that the council did not apply their minds to the question at all, and he bases that contention on the form of the internal documents which ultimately recorded the resolution. As I have said, there were two resolutions for the declaration of a clearance area, one in April and one in July. For this purpose, it is enough to take one of those resolutions, because the other is to all intents and purposes the same. The resolution of the council of July 30, 1957, merely said this:

"Committee Reports: Reports of meetings of the under-mentioned committees, held on the dates indicated, were considered and it was resolved that, where necessary, such reports, as varied by the adopted amendments and corrections, be approved and adopted as minutes of the council."

Underneath is "Name of Committee: Housing. Date of Meeting: July 16, 1957". Further down in the same document, under "Name of Committee" is "Finance, Rating and Valuation". "Date of Meeting: July 23, 1957". So, counsel for the applicant says, the council were merely rubber-stamping something which the committee or committees had said. If one then turns on to what the housing committee said, it was, leaving out all immaterial matters, this:

"After consideration thereof [that is, of the report of the Medical Officer of Health] and a report by the town clerk, we recommend that the council, being satisfied in respect of the areas above mentioned . . . respectively being areas within the borough that . . . (d) the resources of the council are sufficient for the purposes of carrying this resolution into effect the same be and are hereby declared clearance areas within the meaning of the Housing Act, 1936, and that the common seal of the council be affixed to such declarations and maps."

- A On the next page is set out a record of the meeting of the finance committee on July 23, which said this: "We considered the financial effect of the following recommendations by other committees and concur with the proposals", and the relevant one is: "Housing committee . . . (4)", that the areas in question "be declared clearance areas within the meaning of the Housing Act". The wording of the recommendation of the housing committee to which I have referred is, to say the least, poor. It is, I think, purporting to put forward a recommendation of a draft resolution to be carried by the council and it does not say specifically, and this is counsel for the applicant's point, that that committee has considered whether the resources of the council are sufficient, and accordingly if that committee has not considered it, then the council have merely adopted and rubber-stamped what the housing committee had done, not themselves having considered it. As I have said, I think that the wording of the housing committee's recommendation is rather unfortunate, but I am quite satisfied that they and the finance committee intended to and did consider the matter themselves, and that the council being faced, as they thought, with recommendations by two of their specific committees dealing with the matter who had considered it, adopted the recommendation.
- D If that be the true position, it is quite clear that the council quite properly acting through their authorised committees, were satisfied. I think that must be the true view of the minutes themselves, but if there were any doubt, it is to my mind put beyond peradventure by the evidence of the chairman of the housing committee, who says in his affidavit that before making the recommendations to the council, his committee "considered and were satisfied of all the matters recited under para. 4 (2) (a) to (d) of the reports of the meetings of that committee". As I have already said, para. (d) covers the question as to the resources of the council being adequate. In his draft statement of proof which was put in at the public hearing, the assistant borough treasurer said: "Prior to the passing of the resolutions declaring the three clearance areas the council were advised that their financial resources were such as would enable them to deal with those areas". I cannot accede to counsel for the applicant's first point.
- Counsel's second submission is that if the council did consider this matter, they had no, or no sufficient, evidence on which they could be satisfied. Before considering that submission in more detail, I think that it is necessary to consider what it is about which they have to be satisfied. They have to be satisfied that the resources of the authority are sufficient for the purpose of carrying the resolution into effect. At that stage, before the resolution is passed, they may not have made up their mind whether they will proceed thereafter by clearance order or by compulsory purchase order, and it is a possible view that they are only concerned to see whether the resources of the authority are sufficient to cover the less onerous way of performing the next step, in which case they might only have to be satisfied as to such matters as rehousing, the cost of compensation to displaced persons, and possibly any cost that they would be put to if an owner who had been called on to demolish failed to do so. For my part, I think that is putting too narrow a construction on that proviso. It seems to me that where, as here, the authority have determined which of the two steps they will take, in this case to proceed by compulsory purchase order, they must consider whether the resources of the authority are sufficient for that purpose.
- I After all, although it is a second and alternative step, it is one that has to be taken "so soon as may be" after the area has been declared a clearance area, and I think that must be looked on as part and parcel of carrying the resolution into effect.

Counsel for the applicant argues further that where the authority are planning thereafter to redevelop the area themselves, and not to let it to other people for redevelopment, then what the council must consider is whether their resources are sufficient, not only to buy the land and pay compensation, but to carry out

the proposed development. For my part, I cannot accept that contention. At a later stage it is perfectly open to the authority to change their mind; it is perfectly possible also, as indeed I think the evidence was in this case, that development must take place by degrees, and what is developed first may pay for later development. I do not think that in deciding whether to declare an area to be a clearance area, the council are in any way concerned to satisfy themselves of their resources if they do the redevelopment themselves.

The resolution of the council adopting the recommendation of the housing committee quoted the exact words of the Act: satisfied "that the resources of the [council] are sufficient for the purpose of carrying the resolution into effect". If the matter rested there, I do not think that one could go behind those words, but counsel for the applicant relies on various answers that were given under cross-examination by the borough engineer and the borough treasurer at the public hearing. Without going into detail, it was elicited that very large sums were involved in the total purchase and redevelopment, not merely of the land the subject of this compulsory purchase order, but the total land covered by other compulsory purchase orders in the area that I have referred to. One witness went so far as to say that in the end it might cost £550,000, and he did say that no specific figures were before the council or the housing committee when they made the resolution and the recommendation respectively. On that counsel for the applicant says that they could not have been satisfied, that there ought to have been evidence before them of the actual figures of expenditure involved under this scheme, and also evidence how the money was to be found if the resources were not cash resources. He says there being no evidence as to either of those matters, this case falls within the sort of case which SWIFT, J., contemplated in *Re Bowman* (1), and that this order should be quashed.

For my part I would only accede to that argument in a very clear case. It seems to me that here I am faced with the resolution which says: this matter has been considered. The chairman of the housing committee says that it was considered by his committee, and that the council, in passing the resolution, were so advised. True they may not have had specific figures, but it is very difficult in cases such as this to believe that they could have specific figures with any accuracy. Nobody knows what the compensation payable is going to amount to, especially when one considers questions such as disturbance, and nobody knows even if you are going to consider redevelopment costs, what they are likely to be in this era of rising prices. It seems to me that it is perfectly competent for a council, without having specific figures, with the assistance of its experts, to say: this quite clearly from our own knowledge is a matter which plainly comes within the resources of this council, and "the resources" there clearly means not merely cash resources, but their credit in the world, their ability to borrow, and all the rest of it.

For my part, I am not satisfied that it has been shown in this case that the council acted on no evidence; that they were acting mala fide is certainly not suggested. In these circumstances, this application fails, and must be refused.

Motion dismissed.

Solicitors: *P. H. Berry & Co.*, Brentford (for the applicant); *Solicitor, Ministry of Housing and Local Government* (for the respondents).

[Reported by E. COCKBURN MILLAR, Barrister-at-Law.]

A

COMMISSIONERS OF CUSTOMS AND EXCISE

v. JACK BRADLEY (ACCRINGTON) LTD. AND ANOTHER.

[QUEEN'S BENCH DIVISION (Lord Parker, C.J.), October 29, 1958.]

B

Customs—Forfeiture—Vehicle used for “carriage” of thing liable to forfeiture—Heavy oil being used as fuel for vehicle in contravention of Customs and Excise Act, 1952—Oil liable to forfeiture—Whether commissioners also entitled to seize vehicles—Customs and Excise Act, 1952 (15 & 16 Geo. 6 & 1 Eliz. 2 c. 44), s. 277 (1).

C

By s. 200 of the Customs and Excise Act, 1952, it is provided that if heavy oils, delivered for home use, are to be used as fuel for a vehicle a declaration to that effect shall be made and no rebate of duty will then be allowed; and that no such heavy oils on which rebate has been allowed shall be used as fuel for a vehicle unless the amount of the rebate has been paid to the Commissioners of Customs and Excise. If the oils are used in contravention of this last requirement they are liable to be forfeited. The defendants' vehicles were found in use at certain docks with the tanks of the vehicles filled with kerosene mixed with diesel oil; kerosene is defined in the Act of 1952 as a heavy oil. The kerosene that was so used as fuel for the vehicles was part of deliveries of kerosene made to the defendants for home use, and since the defendants had neither made a declaration nor paid duty as provided by s. 200, the kerosene in the tanks became liable to forfeiture, under s. 200. Acting under s. 277 (1) of the Act of 1952, the customs officer also seized as forfeited the vehicles themselves, after giving the notices required to be given under the Act. Section 277 (1) provides that where anything has become liable to forfeiture under the customs or excise Acts, inter alia, “any . . . vehicle . . . which has been used for the carriage” of that thing, for the purposes of committing the offence for which it became liable to forfeiture, shall also be liable to forfeiture. In an action by the commissioners claiming condemnation of the vehicles seized,

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Held: the vehicles had been correctly seized as forfeited under s. 277 (1) of the Customs and Excise Act, 1952, because they were “used for the carriage” of the oil, within the meaning of s. 277 (1), having in fact carried the oil for the purpose of committing the offence (*viz.*, the use of the oil as fuel for the vehicle); accordingly, the commissioners were entitled to condemn the vehicles.

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[For the Customs and Excise Act, 1952, s. 277 (1), see 32 HALSBURY'S STATUTES (2nd Edn.) 870.]

H Actions.

These were two actions brought by the Commissioners of Customs and Excise, the plaintiffs (hereinafter referred to as “the commissioners”), claiming against Jack Bradley (Accrington) Ltd., the defendants in the first action, condemnation of seven vehicles, and against Egbert Bradley, the defendant in the second action, condemnation of one vehicle, pursuant in each case to s. 277 (1) of the Customs and Excise Act, 1952, the vehicles having been seized in January, 1957. The commissioners sued on behalf of the Crown under s. 17 (2) of the Crown Proceedings Act, 1947, as an authorised department. The defendants in the first action were the proprietors of a garage at Accrington, in the county of Lancashire, and owners of the seven diesel vehicles. The defendant in the second action was the owner of the one diesel vehicle. On Jan. 23, 1957, the vehicles were being driven at Preston Docks, in Lancashire, on behalf of the defendants in both actions. In the fuel tank of each vehicle there was a quantity of kerosene,

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mixed with Derv, which was being used as fuel for the vehicles. The kerosene was a heavy oil and a hydrocarbon oil within the definitions contained in s. 195 of the Act of 1952, and was part of certain deliveries of kerosene, totalling about 61,500 gallons, which were delivered to the defendants in both actions, or to the defendants in the first action, between January, 1955 and January, 1957, for home use. Under s. 199 of the Act of 1952, a rebate of duty payable in respect of heavy oils had been allowed on these deliveries. The kerosene having been used as fuel for vehicles without declaring that it was to be so used, and without payment to the commissioners of an amount equalling the allowance of rebate, became liable to be forfeited under s. 200 (2) and (3)* of the Act of 1952. Acting under s. 277 (1) of the Act of 1952, the customs officer seized, as forfeited, the vehicles themselves, after giving proper notices of seizure and claim to the defendants, and the commissioners now contended that they were entitled to forfeit the vehicles under s. 277 (1)†.

Rodger Winn for the commissioners, the plaintiffs.

J. Di V. Nahum, Q.C., and H. Hague for the defendants.

LORD PARKER, C.J.: This is a claim by the Commissioners of Customs and Excise for the condemnation of certain vehicles, the property of the defendants, which they seized as forfeited. The case concerns the use by the defendants, who are garage proprietors and have a fleet of lorries, of kerosene which can be used mixed with fuel oil in tanks for the fuel of the lorries.

Kerosene is used largely for domestic purposes and agricultural purposes and for stationary engines such as cranes, excavators and heating plant; and, so long as it is used for those purposes, the position under the legislation‡ is that no duty is payable. On the other hand, when it is used in connexion with moving engines duty is payable, and because the latter use is comparatively small it is provided that kerosene which is delivered for home use is allowed a full rebate of duty. It becomes, if I may use a term that has been used in this court, rebated kerosene and, so long as it is used for the permitted purposes, no duty becomes payable; but if it is used for moving vehicles, for fuel in tanks, then it becomes subject to duty. It is provided by s. 200 (1) of the Customs and Excise Act, 1952:

“ If, on the delivery of any heavy oils§ for home use, it is intended to use the oils as fuel for a vehicle to which this section applies, a declaration shall be made to that effect in the entry for home use and thereupon no rebate shall be allowed in respect of those oils.”

Sub-section (2) provides:

“ No heavy oils on the delivery of which for home use rebate has been allowed shall be used as fuel for a vehicle to which this section applies unless there has been paid to the commissioners, in accordance with regulations made for the purposes of this sub-section, an amount equal to the rebate on like oils at the rate for the time being in force.”

Finally, by sub-s. (3):

“ If any person uses any heavy oils contrary to the last foregoing sub-

* For the terms of s. 200 (2) and (3), see letters H and I, *infra*.

† For the relevant terms of s. 277 (1), see p. 489, letter D, *post*.

‡ For the general enactments concerning duty on hydrocarbon oils, see Customs and Excise Act, 1952, s. 195 to s. 209 (32 HALSBURY'S STATUTES (2nd Edn.) 805-818).

§ Kerosene is defined to mean heavy oils of which more than fifty per cent. by volume distils at a temperature not exceeding 240 degrees centigrade (Customs and Excise Act, 1952, s. 195 (1)).

- A section or sells any heavy oils having reason to believe that they will be so used, he shall be liable to a penalty of three times the value of the oils or £100, whichever is the greater, and the oils shall be liable to forfeiture."

All the facts of this case that need to be stated are that some of the defendants' lorries were found working at the docks with tanks containing kerosene mixed with diesel oil and that kerosene was not kerosene in respect of which the defendants had made any declaration or in respect of which they had paid duty as provided by s. 200 (2), and, accordingly, by sub-s. (3) the oil became liable to forfeiture and the defendants became liable to a penalty. I gather that they were prosecuted and fined, but I am not concerned with that; I am concerned solely with the question of forfeiture.

C The oil being subject to forfeiture, the question then arises whether the commissioners are, in addition, entitled to forfeit, as they claim to do, the vehicles themselves, and that depends on the true construction of s. 277 (1) of the Act of 1952. So far as material it reads as follows:

- D "Without prejudice to any other provision of this Act, where any thing has become liable to forfeiture under the customs or excise Acts—(a) any . . . vehicle . . . container . . . or other thing whatsoever which has been used for the carriage . . . of the thing so liable to forfeiture, either at a time when it was so liable or for the purposes of the commission of the offence for which it later became so liable; and (b) any other thing . . . found with the thing so
- E liable, shall also be liable to forfeiture."

It is clear, and, indeed, admitted, that there was a contravention of s. 200 (3), and that the oil in the fuel tanks became liable to forfeiture. The question then becomes whether, under s. 277, the vehicles had been used for the carriage of that oil, either at a time when it was liable to forfeiture, or for the purposes of the commission of the offence for which it later became liable, to forfeiture. It is not an easy point and one must bear in mind that powers such as these, if they are to be taken and exercised by the commissioners, must be in clear language. It has been argued forcibly by counsel for the defendants that "carriage" in the ordinary way means carriage of the thing or the goods as a cargo, or transport from one point to another for use there or for distribution, and that it is quite inapt to cover the incidental carriage of fuel for the purposes of being consumed on the journey. He points to the ordinary use of the word "carriage", he points to the previous legislation, the Customs Consolidation Acts of 1853 and 1876, he points out that the Act of 1952 is a consolidating statute and he says there is no reason to treat "carriage" other than as conveyance of the goods as a cargo for the purposes of distribution. "Carriage", of course, is a very wide word, which can be used to cover an incidental carriage of goods as well as a whole cargo of goods. It need not convey the notion of something loaded on a vehicle, but anything so long as it is carried on the vehicle. For my part, I think that the crux of this case is the construction of the words "which has been used for" that carriage. If that meant that a vehicle must be one which has been used with the object of carrying something from "A" to "B"—if the question is "What was the object of the journey, was it to carry goods from 'A' to 'B'?" or "What was the intention, was the intention to carry them from 'A' to 'B'?"—then clearly, approached in that way, it was only incidentally that the vehicles were carrying at the time oil. The purposes for which these vehicles were being used were purposes in connexion with the docks. They were carrying oil for consumption and not for the purpose of taking the oil from one place to another. I do not think, however, that the words used are used in that sense. It seems to

me that they are used, as one would expect them to be used in a statute of this sort, to mean "where use has been made of the vehicle to carry", or "where a vehicle has been made use of in the carriage of". Some support for that view is to be obtained from considering the very next section, s. 278, which is dealing with forfeiture of large vessels, and there forfeiture cannot take place unless the offence in connexion with which the forfeiture is claimed was substantially the object of the voyage during which the offence was committed.

Looked at in that way it seems to me that, as a matter of English, what happened here comes directly within the words in s. 277, because it can be said that use was made of these vehicles for carrying the oil for the purposes of the commission of the offence for which the oil later became liable to forfeiture. The offence is the use of oil. I am not deciding whether it may not be right to say that use is made of oil when it is appropriated to a particular purpose, the unauthorised purpose. One thing, at least, is clear, viz., that oil is used when it is consumed; and, that being so, I cannot see why, as an ordinary matter of language, use was not being made of the vehicles to carry oil for the purposes of that oil being consumed, which itself was the offence for which the oil later became liable to forfeiture. Looked at in that way it seems to me that the plain words of the section cover this case.

I should add that, of course, s. 277 is a general section covering, and intended to cover, the case of vehicles, ships, containers and other matters used in connexion with a number of other offences which have been set out in the statute, and, so I should have thought, the second limb of s. 277 (1) (a) is dealing with this sort of case. It contemplates that one may properly have uncustomed goods in this country but that if some particular use is made of them they become subject to duty, and the words "for the purposes of the commission of the offence for which it later became so liable" clearly cover just this sort of case, where the ordinary use of oil is one which does not attract duty, but if it is used for a particular purpose then duty is payable and, if not paid, an offence is committed.

I think that the oil in these tanks was being carried for the purposes of the commission of the offence, namely, consumption, for which it later became liable to forfeiture. Accordingly, in my view, the seizure was correct in this case and the commissioners are entitled to the condemnation sought.

Judgment for the commissioners, for condemnation of the vehicles.

Solicitors: *Solicitor of Customs and Excise* (for the commissioners, the plaintiffs); *Sharpe, Pritchard & Co.*, agents for *Richard Pate & Co.*, Accrington (for the defendants).

[Reported by WENDY SHOCKETT, Barrister-at-Law.]

A REGIS PROPERTY CO., LTD. v. DUDLEY.

[HOUSE OF LORDS (Viscount Simonds, Lord Morton of Henryton, Lord Tucker, Lord Keith of Avonholm and Lord Denning), July 28, 29, 30, October 21, November 6, 1958.]

Rent Restriction—Rent limit—Adjustment for repairs—Appropriate factor—Basis of determination—Whether determination a decision of fact—Rent Act, 1957 (5 & 6 Eliz. 2 c. 25), s. 1 (1), Sch. 1, Part 1, para. 1 (2), (3).

Landlord and Tenant—Repair—Exception of fair wear and tear—Effect of exception.

A rent-controlled flat was let to a tenant on a monthly tenancy under an agreement in writing. The flat was in a large block of flats in London and was assessed for rating purposes at £54 gross value and £39 rateable value, and was not, therefore, decontrolled by the Rent Act, 1957. Under s. 1 of the Act, the rent limit of the flat was to be composed, apart from rates, of a sum consisting of the 1956 gross value (£54) multiplied by the "appropriate factor" (viz., a figure of $\frac{4}{5}$ where the responsibility for repairs was wholly on the tenant, or $\frac{3}{5}$ where the responsibility for repairs was wholly on the landlord, or a figure between the two where the burden of repair was divided), and of a "reasonable charge" for services provided by the landlord for the tenant. Under cl. 2 (C) of the tenancy agreement, the tenant undertook to keep "the interior of the flat together with all the fixtures and fittings . . . in good and substantial repair and clean sanitary condition (fair wear and tear and damage by accidental fire excepted)"; and under r. 1 of the schedule of rules and regulations incorporated in the tenant's contractual obligations, the tenant undertook to keep "all baths sinks cisterns and waste and other internal pipes . . . clean and open and in proper repair and order" and to be responsible for damage occasioned by his failure so to do or by his negligence. The landlords had the burden of all exterior repairs, of all interior repairs necessitated by fair wear and tear, and of certain plumbing (viz., washering and re-seating water taps) which they had assumed by notice given to the tenant. The landlords applied to the county court to determine the "appropriate factor". The county court judge decided that the appropriate factor was $\frac{3}{5}$ (i.e., midway between the lower and the upper limits), regarding the tenant's burdens in relation to repair as being roughly equal to the landlords' by reason of the high cost of accidental damage (including the tenant's express obligation for damage caused by his negligence) that might fall on the tenant.

Held: (i) (LORD KEITH OF AVONHOLM and LORD DENNING dissenting) the county court judge's assessment of the appropriate factor should stand for the following reasons:—

(a) in evaluating the responsibility of the tenant for repairs under the terms of the tenancy, responsibility of the tenant under those terms for repairing damage due to his carelessness or wilful act should not be disregarded merely because the tenant would be liable for the cost of such repairs at common law either, e.g., as waste or in negligence, if there were no repairing covenant in the terms of his tenancy (see p. 496, letter D, p. 503, letter A, and p. 504, letter I, to p. 505, letter B, post).

(b) in evaluating accordingly the tenant's responsibility for repairs under the terms of the tenancy, the weight to be given to the contractual responsibility of the tenant for repairing damage wilfully or negligently caused by him should be assessed on the basis of a hypothetical tenant, being a person of the type who might reasonably be expected to occupy premises in the relevant locality on the terms of the particular tenancy, to whom perfection in the fulfilment of his legal duty never to be negligent should not be attributed (see particularly p. 506, letter H, p. 497, letter D, and p. 503, letter F, post).

(ii) the exception for fair wear and tear in the tenant's repairing covenant did not except the tenant from responsibility for taking steps to avoid further damage deriving from a defect of repair which itself was originally due to fair wear and tear (see p. 498, letters D and E, p. 504, letter C, p. 506, letter I, p. 508, letter E, and p. 511, letter I, post).

Dictum of TALBOT, J., in *Haskell v. Marlow* ([1928] 2 K.B. at p. 58) approved.

Taylor v. Webb ([1937] 1 All E.R. 590) overruled*.

(iii) the fair wear and tear exception in the tenancy agreement (cl. 2 (C)) applied to the provisions in r. 1 of the schedule thereto in respect of the sanitary and water apparatus since the two provisions were dealing with substantially the same subject-matter.

Decision of the COURT OF APPEAL ([1958] 1 All E.R. 510) affirmed.

[**Editorial Note.** The question whether the decision in *Taylor v. Webb* ([1937] 1 All E.R. 590) on the effect of an exception of fair wear and tear from a repairing covenant was right was not a question which, if *Taylor v. Webb* were overruled, supported the landlords' appeal. The consequence of overruling *Taylor v. Webb*, if there were any consequence, in relation to the amount of the appropriate factor in the present case, would be that the county court judge had erred in favour of the landlords. LORD MORTON OF HENRYTON was of opinion that in relation to such premises as these there would be no difference whether *Taylor v. Webb* was right or wrong (see p. 504, letter C, post); moreover, what quantitative effect the county court judge had attributed to *Taylor v. Webb* was uncertain (see p. 497, letter H, post).

As to the calculation of appropriate factor where tenant partly responsible for repairs, see 23 HALSBURY'S LAWS (3rd Edn.) 781, para. 1548.

For the Rent Act, 1957, s. 1 and Sch. 1, Part 1, para. 1, see 37 HALSBURY'S STATUTES (2nd Edn.) 552, 579.]

Cases referred to:

- (1) *Taylor v. Webb*, [1937] 1 All E.R. 590; [1937] 2 K.B. 283; 106 L.J.K.B. 480; 156 L.T. 326; 31 Digest (Repl.) 296, 4332.
- (2) *Haskell v. Marlow*, [1928] 2 K.B. 45; 97 L.J.K.B. 311; 138 L.T. 521; 31 Digest (Repl.) 362, 4934.
- (3) *Gutteridge v. Munyard*, (1834), as reported in 7 C. & P. 129; 1 Moo. & R. 334; 31 Digest (Repl.) 175, 3085.
- (4) *Brown v. Davies*, [1957] 3 All E.R. 401; 3rd Digest Supp.
- (5) *Warren v. Keen*, [1953] 2 All E.R. 1118; [1954] 1 Q.B. 15; 3rd Digest Supp.
- (6) *Marsden v. Edward Heyes, Ltd.*, [1927] 2 K.B. 1; 96 L.J.K.B. 410; 136 L.T. 593; 31 Digest (Repl.) 45, 2044.
- (7) *Ferguson v. Anon.*, (1797), 2 Esp. 590; 31 Digest (Repl.) 395, 5225.
- (8) *Kinlyside v. Thornton*, (1776), 2 Wm. Bl. 1111; 96 E.R. 657; 31 Digest (Repl.) 397, 5245.
- (9) *Standen v. Christmas*, (1847), 10 Q.B. 135; 16 L.J.Q.B. 265; 9 L.T.O.S. 169; 116 E.R. 53; 31 Digest (Repl.) 341, 4735.

Appeal.

Appeal by the landlords, Regis Property Co., Ltd., from an order of the Court of Appeal (JENKINS, SELLERS and PEARCE, L.JJ.), dated Feb. 7, 1958, and reported [1958] 1 All E.R. 510, affirming an order of His Honour JUDGE HARGREAVES, dated Aug. 29, 1957, whereby it was ordered and declared that the appropriate factor by which the gross value of premises known as flat 248, Chelsea Cloisters, Sloane Avenue, S.W.3, was to be multiplied for the purpose of

* The principle that is overruled is stated at p. 498, letter F, post.

A ascertaining the rent limit applicable thereto was five-thirds. The respondent, Thomas Henry Dudley, was the tenant of the flat. At all material times the flat had a gross value of £54 and a rateable value of £39. The facts appear in the opinion of VISCOUNT SIMONDS.

Neil Lawson, Q.C., and Brian Galpin for the appellants, the landlords.

B *R. E. Megarry, Q.C., and G. Avgherinos* for the respondent, the tenant.

The House took time for consideration.

Nov. 6. The following opinions were read.

VISCOUNT SIMONDS: My Lords, the respondent is the tenant of certain premises known as flat 248, Chelsea Cloisters in the county of London. C His landlords are the appellants, Regis Property Co., Ltd. These premises are, by reason of their low net rateable value, subject to rent control under the provisions of the Rent Act, 1957. That Act, however, provides that a landlord may, on giving the appropriate notice, alter the method of calculating the rent of controlled dwelling-houses from the former basis of a standard rent plus permitted increases to a new basis which, so far as is relevant to the present D appeal, is to be fixed by multiplying the gross rateable value of the premises by what is called "the appropriate factor".

Taking advantage of this provision, on July 22, 1957, the appellants applied to the West London County Court for an order determining the appropriate factor by which the gross value of the premises should be multiplied for the purpose of ascertaining the rent limit applicable thereto, and served due notice E of the application on the respondent. Other matters also were brought before the court, but with these your Lordships are not concerned. On Aug. 29, 1957, the learned county court judge made an order determining that the appropriate factor for the relevant purpose was five-thirds. An appeal from his order was dismissed by the Court of Appeal. Your Lordships are now asked to set these F orders aside and to remit the application to the county court for the redetermination of the appropriate factor in accordance with what appear to your Lordships to be the correct principles on which it should be determined. I emphasise that your Lordships can take this step only if the learned judge and the Court of Appeal acted on some wrong principle.

It is convenient that I should now state in greater detail first the relevant G provisions of the Act of 1957 and then the tenancy agreement between the parties. Section 1 (1) of the Act provides that, subject to the following provisions of the Act, the rent recoverable for any rental period from the tenant under a controlled tenancy shall not exceed a rent of which the annual rate is equal to the 1956 gross value of the dwelling multiplied by two or, if the responsibility for repairs is such as is specified in Part 1 of Sch. 1 to the Act, by the appropriate H factor specified in the same Part, together with annual amounts in respect of rates and services with which this appeal is not concerned. As I have already indicated, "appropriate factor" means the number by which the 1956 gross value is to be multiplied in determining the rent limit. The relevant provisions of Part 1 of Sch. 1 may be set out verbatim. They are as follows:

I "1.—(1) The following provisions shall have effect in ascertaining the rent limit by reference to the 1956 gross value.

"(2) If under the terms of the tenancy the tenant is responsible for all repairs, the appropriate factor shall be four-thirds.

"(3) If under the terms of the tenancy the tenant is responsible for some, but not all, repairs, the appropriate factor shall be such number less than two but greater than four-thirds as may be agreed in writing between the landlord and the tenant or determined by the county court."

It is plain that it is only Part 1 of the Schedule which has any bearing on the determination of the appropriate factor, but the appellants referred to and relied on Part 2 and I, therefore, myself refer to it. It is concerned with the obtaining of a so-called certificate of disrepair which, while it is in force, prevents the landlords from getting the increase of rent which they might otherwise get under Part 1. It is headed "Abatement for disrepair", and contains elaborate provisions for the service by a tenant of a notice of disrepair of the premises by reason of defects stated in the notice, for the landlords' undertaking to repair the defects, for the issue by the local authority to the tenant of a "Certificate of disrepair", and for the cancellation in certain circumstances of such certificate, and so on. Specifically it provides, by para. 7 (2), that, where a certificate of disrepair is issued then, as respects any rental period beginning while the certificate is in force, the appropriate factor shall be four-thirds. Reliance was also placed on para. 15, which provides that references in that Part (i.e., Part 2) of the Schedule to defects for which the tenant is responsible are references to defects for the remedying of which, as between the landlord and the tenant, the tenant is responsible, or defects which are due to any act, neglect or default of the tenant or any person claiming under him or any breach by the tenant or such a person of any express agreement. These provisions may give rise to difficulties of their own, but I am at a loss to know what light they can throw on the meaning of the provisions of Part 1.

The tenant's obligations in respect of repair are contained in cl. 2 (C), (D), (E) and (F) of the agreement and are as follows:

"(C) To keep the interior of the flat together with all the fixtures and fittings now or hereafter therein (including the doors windows sanitary and water apparatus thereof) in good and substantial repair and clean sanitary condition (fair wear and tear and damage by accidental fire excepted), and so to deliver up at the end or sooner determination of the tenancy:

"(D) To forthwith comply with any notice that may be given by the landlord requiring any breach of any of the obligations on the part of the tenant under the last preceding clause to be made good Provided that if the tenant shall make default for a period of one month in complying with such notice it shall be lawful for the landlord (but without prejudice to the right of re-entry hereinafter contained) to enter upon the flat and execute the repairs at the expense of the tenant in accordance with the provisions hereof and the expenses of such repairs shall be repaid by the tenant to the landlord on demand:

"(E) To observe and perform the rules and regulations specified in the schedule hereto or any reasonable modifications thereof or additions thereto made from time to time by the landlord for the proper conduct of the building and of which notice shall be given to the tenant in writing or left for the tenant at the flat. The tenant shall accept as final and binding the landlord's decision upon any matter arising out of the said rules and regulations or any such modifications thereof or additions thereto:

"(F) Not without the previous consent in writing of the landlord to alter or interfere with the construction or arrangement of the flat or the fixtures or fittings therein belonging to the landlord or for which the landlord is responsible or alter or injure any of the walls floors ceilings wiring pipes or drains of the flat or alter the colour of any painted woodwork and if the tenant shall carry out any redecoration or other work he shall properly prepare all woodwork before painting and strip or properly prepare all walls and ceilings before papering or distempering:"

The only relevant rule and regulation in the schedule is r. 1, which is in these terms:

- A "Tenants shall keep all baths sinks cisterns and waste and other internal pipes in or connected with their flats clean and open and in proper repair and order and shall be responsible for all damage occasioned to their own or other flats through any breach of this rule or through the improper use or negligence of themselves or their servants or through the stopping up or bursting of the said baths sinks cisterns or pipes due to the negligence of the tenants or their servants and shall carry out during the tenancy any works required to the internal water pipes fittings apparatus etc., to comply with any notices served by the Metropolitan Water Board or the local sanitary authority."

This provision is clearly out of place. It is an important obligation of repair and I should have expected it to follow cl. 2 (C) in the body of the agreement. It will be seen that some difficulty has been caused by this fact.

- The only other fact which need be noticed is that the appellants' agents circularised the tenants to the effect that, where taps required washering or re-seating, they were particularly requested to report it to the porter's lodge when the landlords would be pleased to effect repairs without charge to the tenant. I do not think that this offer, which could at any moment be recalled, can affect the appropriate factor.

- When the application came before the county court judge, evidence was given by an expert witness on each side, and it was natural that their opinions should widely differ as to the burden in terms of pounds, shillings and pence falling on the tenant under the terms of the agreement. It was a noteworthy fact that the appellants' witness was for reducing the respondent's liability, the respondent's for enlarging it. The learned judge did not wholly accept the evidence of either of them, and held that the appellants' liability for repairs should be valued at £7 5s. per annum and the respondent's at £7 7s. He, therefore, assessed the appropriate factor at five-thirds. I do not think that, in coming to this conclusion, the learned judge preferred the principles adopted by one witness to those adopted by the other; I doubt whether there was in this respect any difference between them. The difference was in quantum—a matter of fact on which the decision cannot be questioned unless the judge erred in principle. I ask, then, what was the error in principle? It appears that, in the county court and in the Court of Appeal, two main questions and a subsidiary question were argued. The first main question is succinctly stated in the first and second reasons in the appellants' formal Case. They are (i) that the

"county court judge erred in principle in having regard to repairs for which the respondent would be responsible at common law had there been no repairing covenant in his tenancy agreement",

- and (ii) (which is consequential) that he "erred in principle in evaluating those liabilities, in that he credited the respondent with the full value thereof."

- As I understand the argument for the appellants, it is that, if some repair is necessary to the premises and if that repair is made necessary by some act of the tenant for which he could be held liable at common law, then, notwithstanding that he is also liable to repair under the terms of his tenancy, it is a repair for which he is not to be regarded as responsible for the purpose of determining the appropriate factor under Part 1 of Sch. 1 to the Act. This argument was rejected, and, in my opinion, rightly rejected, in the county court and the Court of Appeal. The court is concerned only with the tenant's responsibility for repairs under the terms of the tenancy. It is irrelevant why those repairs have become necessary. I am ignoring for the moment the "fair wear and tear" clause which demands separate consideration. Nothing could be plainer than the language of Part 1: "If under the terms of the tenancy the tenant is responsible for *all* repairs": "If under the terms of the tenancy the tenant

is responsible for some, but not all, repairs". I see no reason why "all" should mean anything less than all, why there should be excluded from "all" repairs those repairs (if there be any) which the tenant can be called on to execute by invoking the doctrine of permissive waste or any implied obligation on his part arising at common law out of the relation of landlord and tenant or even, as was suggested, by reason of his negligence. Not only is there no possible reason for any such interpolation; it would, as a practical matter, be a difficult, if not an impossible, task to fix the tenant with any such liability. I do not recall any case, I do not, my Lords, believe that there is any case in the books, in which a court of law has been asked to do gross violence to the plain language of a statute on such an inadequate pretext. The language is plain; no words could more plainly express a simple concept. The violence is gross; an indefinite "some" is substituted for "all". The pretext is inadequate and worse. For it is, in itself, nothing else than the assertion that, in this difficult area of the relation of landlord and tenant, the court knows better than Parliament what changes should be made in the existing legislation and will adjust and alter the language of a statute accordingly. I reject with such emphasis as I can command any such suggestion. I am content to adopt the view expressed by PEARCE, L.J., delivering the unanimous judgment of the Court of Appeal ([1958] 1 All E.R. at p. 518), that such repairs are, in fact, a responsibility under the express terms of the agreement, and the fact that there may be a concurrent liability at common law does not alter that fact. He added, and I agree, that, if one applies the test of common sense and practice, one can hardly imagine a landlord claiming against a tenant in respect of them other than under the express covenant. This challenge to the judgment of the county court judge, which primarily, if not solely, turns on the true construction of the statute, therefore fails.

It is convenient at this stage to notice an argument which was directed to the alleged anomalous result of the decision. It was said to put a premium on a tenant's negligent conduct enabling him to proclaim how bad a tenant he was and would be, what damage he would do and how heavy would be his liability to repair and, therefore, to demand that the appropriate factor should be as low as possible. My Lords, I do not doubt that such complicated legislation as the Rent Act has led, and will lead, to some anomalies. But I am not moved by this suggested anomaly. The court is not concerned with the character or proclivities of the particular tenant. Rightly, no evidence was given in regard to those of the present respondent. The court is concerned only with the premises and the relevant repairing obligations of the tenant.

At this stage I must diverge from the argument as presented to the Court of Appeal and in the formal Case of the appellants in this House. The assumption being made that, on the true construction of the Act, the county court judge did not err in principle in having regard to repairs for which the respondent might be responsible at common law had there been no repairing covenant in his tenancy agreement, it appeared to their Lordships that the question was still unresolved what weight should be given to this element in a tenant's obligations in determining the appropriate factor. They, therefore, required further argument from counsel, and posed to them the question whether, on the assumption already stated, the learned judge had misdirected himself by not assuming for the purpose of his determination a tenant who was reasonably careful in his user of the premises let to him. It appeared, however, at once that there was some ambiguity in this question. Learned counsel for the appellants, adhering to the view that damage due to negligence (as I will call it for short) must be altogether excluded, was, of course, ready to accept the standard of a hypothetical tenant who was reasonably careful, if that meant a tenant who, being reasonably careful, never caused damage by carelessness. A number of difficult questions would, admittedly, arise in respect of damage caused by the

A tenant's family or guests or licensees or trespassers. But, broadly speaking, the result was precisely the same as it would be if no assumption had been made, and damage due to negligence and a consequent obligation to repair were outside the relevant computation. And to reinforce this view, he made it quite clear that he did not ask your Lordships to remit the case to the county court for further consideration except on that basis.

B The attitude of learned counsel for the respondent was very different. He agreed, he could not do otherwise, that it is necessary to assume some kind of tenant since the rent is to be paid by a tenant. What sort of tenant, then, is this hypothetical tenant to be? For counsel for the respondent, as for counsel for the appellants, the essential question was whether damages for negligence should be excluded, and it appeared to me that, as long as this question was answered in the negative, he did not mind whether the hypothetical tenant was described as an average tenant, or a reasonably careful tenant or by any other description. He was, in fact, satisfied with the way in which the matter had been dealt with by the county court judge, who declined to assume a tenant who in his own words "can be relied on always to be careful". On this question there was much discussion. It was clearly a very difficult matter to define the hypothetical tenant with any sort of precision. It is desirable that more definition should not be attempted than the occasion needs and, therefore, though I had myself attempted that task, I shall say no more than that, having read the opinion which my noble and learned friend, LORD TUCKER, will shortly deliver, I find myself fully in agreement with every word of it and respectfully adopt it.

E I turn to the second main question argued in the courts below, and again I look at the appellants' third and fourth reasons in their formal Case. They are (i) that the county court judge erred

F "in principle in crediting the respondent with more than a nominal amount in respect of his liability to repair; in view of the 'fair wear and tear exception' contained in the respondent's tenancy agreement",

and (ii) that *Taylor v. Webb* (1) ([1937] 1 All E.R. 590) was rightly decided. This latter reason must remain, for the moment, enigmatical. I will return to it.

G The purport of this argument is that the qualification of the repairing covenant in cl. 2 (C) by the fair wear and tear clause reduces the value of the tenant's obligation to a small or even negligible amount, that this is the effect of the decision in *Taylor v. Webb* (1), and that the learned judge did not pay sufficient regard to it. I must interpose that counsel for the respondent, the tenant, while content with the order as it stands, asks that, if the matter is remitted to the county court, there should be a direction to the judge to assess the appropriate factor on the footing that *Taylor v. Webb* (1) was wrongly, not rightly, decided. He claimed that too much weight had been given to that decision and that, on a true view of the clause, the tenant's obligation under the covenant, though qualified, was greater than the judge allowed. It is, I think, a fair criticism of the judgment of the learned judge that it is not easy to see just how, as a matter of principle, he did regard the impact of the fair wear and tear clause, nor how he translated into figures the qualification which it imposed on the covenant.

I My Lords, I must now refer to *Taylor v. Webb* (1), which has loomed large in this case, though I doubt whether it has great practical importance. There is, I think, no doubt that the decision in that case has been regarded as making a substantial change in the law. It may be that, in the peculiar circumstances of the case, the decision was correct. I do not have to decide that. But I entertain no doubt that the statements of principle made by the court (SLESSER,

L.J., SCOTT, L.J., and FARWELL, J.), if they are applied (as I think they were intended to apply) to the common case of a qualified repairing covenant, cannot be supported. I say "intended to apply" because the court expressly overruled the decision of a Divisional Court in *Haskell v. Marlow* (2) ([1928] 2 K.B. 45), in which the court had, in what I have called the common case, given a narrower meaning and effect to such a covenant. In the latter case, TALBOT, J., whose judgment I prefer to that of SALTER, J., said of such a covenant (*ibid.*, at p. 58):

"The meaning is that the tenant (for life or years) is bound to keep the house in good repair and condition, but is not liable for what is due to reasonable wear and tear. That is to say, his obligation to keep in good repair is subject to that exception. If any want of repair is alleged and proved in fact, it lies on the tenant to show that it comes within the exception. Reasonable wear and tear means the reasonable use of the house by the tenant and the ordinary operation of natural forces. The exception of want of repair due to wear and tear must be construed as limited to what is directly due to wear and tear, reasonable conduct on the part of the tenant being assumed. It does not mean that if there is a defect originally proceeding from reasonable wear and tear the tenant is released from his obligation to keep in good repair and condition everything which it may be possible to trace ultimately to that defect. He is bound to do such repairs as may be required to prevent the consequences flowing originally from wear and tear from producing others which wear and tear would not directly produce."

The learned judge then quotes as an example the case of a tile falling off a roof and the consequential damage.

My Lords, I have quoted this passage at length because it states better than I could state it what I believe was always regarded as the law on this matter until *Taylor v. Webb* (1) was decided, and should now be reinstated as the law by your Lordships' decision. In that case each of the three judges directly disapproved of the reasoning of TALBOT, J., in *Haskell v. Marlow* (2) and, in effect, held that the clause relieved the tenant not only from the immediate effects of wear and tear but from the obligation to take any steps to avert any consequential damage. I think that the learned editor of *WOODFALL ON LANDLORD AND TENANT* (25th Edn.) was well justified in saying (at p. 766):

"It is open to question whether this case [*sc. Taylor v. Webb* (1)] does not go too far as a statement of principle and should be regarded perhaps as a decision on the particular facts; the principle quoted from TINDAL, C.J., seems to accord better with what draftsmen intend . . ."

The quotation to which he refers is the well-known passage from *Gutteridge v. Munday* (3) ((1834), 1 Moo. & R. 334). The guarded observations of the Court of Appeal in *Brown v. Davies* (4) ([1957] 3 All E.R. 401) point in the same direction.

My Lords, can it then be said that, in this case, the judge was wrong in principle in the force which he gave to the clause? He had before him the then binding decision in *Taylor v. Webb* (1); he said that he must consider in due course the application of that decision to the circumstances of the case and, though, as I have said, it is not clear at least quantitatively how he applied it, I can see no ground for saying that in any sense adverse to the appellants his decision was based on any wrong principle. On the contrary, I can well understand the claim of the respondent that, if the learned judge, following *Taylor v. Webb* (1), made his assessment on the footing that the tenant was relieved from all liability not only in respect of an original defect but also from all consequential damage, then he erred in principle in favour of the appellants. Therefore the second main ground of challenge fails.

A But, my Lords, there is another aspect of this clause which has caused me much difficulty. It is closely linked with what I have called a subsidiary question which arises on the first rule in the schedule. That has already been set out. The question was whether the fair wear and tear clause applied to the rule as well as to cl. 2 (C) of the tenancy agreement in which it is to be found. The learned judge held that it did. The Court of Appeal
B held that it could not be read into r. 1 without qualification as it seemed inappropriate to the obligations in regard to various specific matters imposed by the rule. With this I agree. It would, for instance, be absurd to qualify damage caused "through improper use or negligence" by a fair wear and tear clause. On the other hand (agreeing again with the Court of Appeal), I see no reason why, reading the rule with cl. 2 (C) as I must
C since that clause specifically refers to "sanitary and water apparatus", the fair wear and tear clause should not be applied to those matters to which it can properly be applied, i.e., to the opening words down to the words "proper repair and order". And this, I think, is all that the learned judge in effect has done.

Finally, it has been said that the learned judge has erred in principle because,
D in his enumeration of the items for which the tenant will remain liable notwithstanding the fair wear and tear clause, he has included damage which falls within the exception provided by that clause. My Lords, it is obvious that it may be open to debate, whether any particular damage necessitating repair when it has occurred has been due to fair wear and tear or not. Still more is it open to debate whether, when it occurs in the future, it will be due to fair wear and tear.
E I should not myself say that it is impossible or even unlikely that some of the events enumerated might not be so due. But I do not think it is possible to say that the learned judge erred in principle in his enumeration and I think, therefore, that, on this ground too, the appeal fails. In the result the appeal should, in my opinion, be dismissed.

F **LORD MORTON OF HENRYTON:** My Lords, the most important question arising on this appeal relates to the method to be adopted in ascertaining the "appropriate factor" specified in Part I of Sch. 1 to the Rent Act, 1957, in a case where, under the terms of the tenancy, the tenant is responsible for some, but not all, repairs. A minor question arises as to the true construction of the tenancy agreement made between the appellants as landlords and the respondent
G as tenant. The relevant facts are as follows. The appellants are the owners of a large block of flats known as Chelsea Cloisters, comprising 804 residential flats of which 679 are let on unfurnished tenancies. The respondent is the tenant of one of these flats, No. 248, which was let to him unfurnished by a written tenancy agreement dated Apr. 10, 1956. The flat consists of two rooms, a kitchenette, hall and bathroom with a radiator in each of the two rooms, a heated towel rail
H and a watercloset in the bathroom and a wash-basin and sink with hot and cold water taps in the bathroom and kitchenette respectively. The total area of the flat is 310 square feet. The gross and rateable values of the flat are and were at all material times £54 and £39 respectively. By reason of its rateable value, the flat was a dwelling-house controlled by the Rent and Mortgage Interest Restrictions Acts, 1920 to 1939, and continued to be controlled after the coming into
I force of the Act of 1957.

By the tenancy agreement, the appellants let the flat to the respondent together with the use of all the fixtures and fittings therein on a tenancy from month to month from Apr. 1, 1956, at the yearly rent of £139 16s. 9d. At the commencement of these proceedings the rent had been increased to £145 17s. 5d. by reason of increases in rates. The tenancy agreement provided (*inter alia*) as follows:

"2.—The tenant hereby agrees with the landlord:— . . . (C) To keep the interior of the flat together with all the fixtures and fittings now or hereafter

therein (including the doors windows sanitary and water apparatus thereof) in good and substantial repair and clean sanitary condition (fair wear and tear and damage by accidental fire excepted) and so to deliver up at the end or sooner determination of the tenancy . . .

“(E) To observe and perform the rules and regulations specified in the schedule hereto or any reasonable modifications thereof or additions thereto made from time to time by the landlord for the proper conduct of the building and of which notice shall be given to the tenant in writing or left for the tenant at the flat. The tenant shall accept as final and binding the landlord’s decision upon any matter arising out of the said rules and regulations or any such modifications thereof or additions thereto . . .

“Schedule of Rules and Regulations

“1.—Tenants shall keep all baths sinks cisterns and waste and other internal pipes in or connected with their flats clean and open and in proper repair and order and shall be responsible for all damage occasioned to their own or other flats through any breach of this rule or through the improper use or negligence of themselves or their servants or through the stopping up or bursting of the said baths sinks cisterns or pipes due to the negligence of the tenants or their servants and shall carry out during the tenancy any works required to the internal water pipes fittings apparatus etc., to comply with any notices served by the Metropolitan Water Board or the local sanitary authority.”

At some time within a year before the commencement of the proceedings herein, Plus Flats Management, Ltd., the managing agents of the appellants, caused a circular letter in the following terms to be delivered to the tenants at Chelsea Cloisters:

“Dear Sir or Madam, re Water Taps.

“In cases where taps require washering (that is to say where water continues to drip when the tap is turned off) or re-seating (where there is noise or vibration when the tap is turned) tenants are particularly requested to report this to the porter’s lodge, when the landlords will be pleased to effect repairs without charge to the tenant.”

On July 6, 1957, the Rent Act, 1957, came into force, and introduced a limit on the rent recoverable in respect of houses let under a controlled tenancy, which was to be ascertained on a different basis from that laid down in previous Rent Acts. The provisions of the Act of 1957 which are material to this appeal are as follows:

“1(1) Subject to the following provisions of this Act the rent recoverable for any rental period from the tenant under a controlled tenancy shall not exceed the following limit, that is to say a rent of which the annual rate is equal to the 1956 gross value of the dwelling multiplied by two (or, if the responsibility for repairs is such as is specified in Part 1 of Sch. 1 to this Act, by the appropriate factor specified in the said Part 1), together with—

“(a) the annual amount, ascertained in accordance with Sch. 2 to this Act, of any rates for the basic rental period, being rates borne by the landlord or a superior landlord; and

“(b) such annual amount as may be agreed in writing between the landlord and the tenant or determined by the county court to be a reasonable charge for any services for the tenant provided by the landlord or a superior landlord during the basic rental period or any furniture which under the terms of the tenancy the tenant is entitled to use during that period.”

No question arises on this appeal under para. (a) and para. (b), as these matters have been agreed between the parties.

A “ 1 (2) The limit on the rent recoverable under a controlled tenancy for any rental period (hereinafter referred to as ‘ the rent limit ’) shall be subject to adjustment from time to time under s. 3 to s. 5 of this Act and to reduction as provided by Part 2 of Sch. 1 to this Act in case of disrepair.”

Section 25 (1) (so far as relevant) is in the following terms:

B “ ‘ appropriate factor ’ means the number by which the 1956 gross value is to be multiplied in determining the rent limit;

“ ‘ controlled tenancy ’ means a tenancy to which the Rent Acts apply or a statutory tenancy;

C “ ‘ basic rental period ’ means the rental period comprising the commencement of this Act or, in the case of a controlled tenancy beginning thereafter, the first rental period of the tenancy;

“ ‘ dwelling ’, except in s. 16 of this Act, means in relation to a controlled tenancy the aggregate of the premises comprised in the tenancy . . . ”

Schedule 1, Part 1, provides:

D “ 1.—(1) The following provisions shall have effect in ascertaining the rent limit by reference to the 1956 gross value.

“ (2) If under the terms of the tenancy the tenant is responsible for all repairs, the appropriate factor shall be four-thirds.

E “ (3) If under the terms of the tenancy the tenant is responsible for some, but not all, repairs, the appropriate factor shall be such number less than two but greater than four-thirds as may be agreed in writing between the landlord and the tenant or determined by the county court.”

It will be observed that the present case comes within para. 1 (3). Paragraph 2 (1) provides:

F “ In the foregoing paragraph the expression ‘ repairs ’ does not include internal decorative repairs . . . ”

The remainder of para. 2 relates to internal decorative repairs, which are not relevant to this appeal. Part 2 of Sch. 1 enables a tenant, in the circumstances therein set forth, to obtain a “ certificate of disrepair ” from the local authority, with a consequential reduction of the “ appropriate factor ” to four-thirds while the certificate is in force.

G No agreement was made between the parties, under para. 1 (3) of Sch. 1, as to the appropriate factor for ascertaining the rent limit applicable to the flat and, on July 22, 1957, the appellants issued an application in the West London County Court for a determination of the appropriate factor under para. 1 of Part 1 of Sch. 1 to the Act of 1957. At the hearing of the application, expert evidence was called on behalf of the appellants and the respondent respectively with regard to the estimated yearly expenditure on repairs (other than internal decorative repairs) which would be incurred in respect of the flat, and the relative proportion thereof which would fall on the appellants and the respondent having regard to the repairing provisions of the tenancy agreement.

I The learned county court judge accepted the evidence tendered on behalf of the appellants in part and the evidence tendered on behalf of the respondent in part, and held that the appellants’ liability for repairs should be estimated at £7 5s. per annum and the respondent’s liability at not less than £7 7s. per annum. After giving his reasons for arriving at the figure of £7 5s. per annum in respect of the landlords’ liability, the learned judge continued as follows:

“ In my view, however, the tenant’s liability should be put at a far higher figure than the £2 10s. that Mr. Dale allows, even taking into account the fair wear and tear clause, as of course I must do. My reason for forming this

opinion is that in the case of a flat such as this, where most of the fixtures and fittings are metal or porcelain, or where all are indoors, the fair wear and tear will be very small and may be regarded in some cases as almost negligible. The main articles that will have to be replaced by the landlord under the fair wear and tear clause are the electric light bulbs and the washers on the taps. These latter the landlord has specifically undertaken to be responsible for by circulating the undated slip to which I have already referred, although it appears to me that under the fair wear and tear clause the landlord will be liable for this in any case.

"The tenant, however, remains liable for all the rest of the repairs inside the flat. I have in mind such items as the following: (A) keeping waste pipes unblocked, and (B) repairing basins cracked by dropping articles into them, for example, tooth glasses, bottles, hairbrushes or tumblers; breaking the chain or the handle, or whatever the contrivance is, of the lavatory cistern, chipping the bath enamel; repairing damage to the walls caused, for example, by driving in nails or Rawlplugs for pictures and photographs; breaking the bath panel or a window pane; damage to the fittings of the kitchenette; damage to the woodwork from cigarette ends, where more serious than mere decoration can repair; and, more rarely, damage from the flooding of his own or adjoining flats.

"All these are the sort of things that happen in flats, and they cannot be regarded as fair wear and tear. I take the view that even allowing for the fair wear and tear clause the tenant's liability should be assessed at not less than £7 7s. per annum in all. This view does not necessarily conflict with Mr. Dale's figures, because tenants who do damage which is obviously not fair wear and tear have no motive for reporting it, and are more than likely to put it right without the landlord knowing anything about it. If they do report it the landlord's manager will probably tell them that the landlord is not responsible for the carelessness of the tenant.

"As I take the view, therefore, that as nearly as I can form an estimate, the cost of repairs to the dwelling is shared about equally between the landlord and tenant, I hold the appropriate factor to be 1-2/3rds of the gross value, that is to say, £54, plus £36. The rent currently applying in the case of this flat, therefore, will be £90."

The learned judge further held that, on the true construction of cl. 2 (C) and r. 1 of the schedule to the tenancy agreement,

"the tenant is responsible for everything set out in the clause and the rule, but he may excuse himself if he can show that the damage in respect of which the landlord is seeking to make him liable is due to fair wear and tear."

The appeal of the appellants to the Court of Appeal was dismissed.

My Lords, it was common ground between the parties that the learned judge was right in the course which he pursued of estimating the sums which each party would have to spend per annum on repairs, under the terms of the tenancy, and fixing the appropriate factor on this basis; and I add that the words "under the terms of the tenancy" in Part 1 of Sch. 1 must, in my view, apply equally to an oral and a written tenancy agreement. The court must first ascertain what obligations as to repair are placed on the tenant under the terms of the tenancy and then estimate the annual cost of carrying out these terms. It is also common ground that, on the figures at which the learned judge arrived, he was right in fixing the appropriate factor at $1\frac{2}{3}$ of the gross value, that figure being, of course, exactly half-way between the maximum of 2 and the minimum of $1\frac{1}{3}$. It was, however, contended on behalf of the appellants that the learned county court judge fell into an important error of principle in assessing the tenant's

A liability for repairs under the terms of the tenancy at "not less than £7 7s. per annum", because he took into account repairs rendered necessary by conduct of the tenant which would be a breach of his obligations at common law.

My Lords, I would reject this contention, for the reasons given by PEARCE, L.J., in delivering the judgment of the Court of Appeal, but I have felt considerable doubt whether the learned judge did not go wrong in a different way. It is clear that the amount which any tenant will have to spend on repairs in a year, under the terms of his tenancy, depends in part on how far the terms of his tenancy make him liable for repairs, in part on the nature of the property let, and in part on the behaviour of the tenant. Thus, in estimating this sum, the court must assume a tenant of a particular type. This was recognised and accepted by counsel for appellants and respondent when the appeal was further argued on Oct. 21, 1958. It was not suggested by either side that the court should investigate the personal qualities of the person who is, in fact, the tenant at the time when the estimate has to be made. Apart from the difficulties involved in carrying out such an investigation, it was pointed out by counsel for the appellants that, once the court has determined the "appropriate factor" in respect of any premises, it remains binding so long as these premises are subject to rent control, subject to the effect of any certificate of disrepair which may be granted under Part 2 of Sch. 1 to the Act.

My Lords, in my opinion, the type of tenant who should be assumed for the purposes of the calculation now under consideration is a tenant who is reasonably careful in his user of the premises. I can see no good reason why the legislature should have had any other type of tenant in mind when it placed on the court the task of determining the "appropriate factor"; a task which must obviously involve estimating the burden of the repairs for which the landlord and the tenant respectively are "responsible under the terms of the tenancy". It would surely be wrong for the court, in estimating the burden on the tenant under these terms, to do so on the footing that the tenant will make that burden heavier by reckless behaviour or wanton destruction. I recognise, however, that even the reasonably careful tenant may have moments when he acts in a negligent way, and damage may be done by negligent acts of his wife (if any), children (if any), servants and agents. I think that a county court judge is justified in making some allowance for the possibility of such events happening. In my opinion, however, the learned judge in the present case has taken too gloomy a view of the conduct to be attributed to the hypothetical tenant, and the "sort of things which are likely to happen" in this little two-roomed flat, as set out in the list of items, which I have quoted from his judgment. For this reason I was at one time disposed to think that the present case should be remitted to the county court, for reconsideration of the figure of £7 7s.; but when this appeal was further argued on Oct. 21, I found that counsel for the appellants did not wish to ask for such an order unless your Lordships were of opinion that every repair rendered necessary by negligence should be excluded from the calculation. This would involve imagining a tenant who is never at any time negligent during the whole course of his tenancy, and attributing a similar perfection of behaviour to his spouse (if any), children (if any) and servants or agents. I cannot find in the Act any justification for this.

I now turn to an argument submitted by counsel for the respondent. In the course of his judgment, the learned judge said:

"My attention has been drawn to the case of *Taylor v. Webb* (1) ([1937] 1 All E.R. 590), but it must be remembered that the damage under consideration in that case was due to the state of the outside of a house exposed to the elements."

Later he observed: "It is the application of this decision to the circumstances of the present case that I shall have to consider in due course." In fact, the

learned judge did not refer again to *Taylor v. Webb* (1), but counsel for the respondent contended (i) that he must be taken to have applied the principles laid down in *Taylor v. Webb* (1) in arriving at the figure to be ascribed to the "fair wear and tear" exception in cl. 2 (C) of the tenancy agreement; (ii) that *Taylor v. Webb* (1) wrongly overruled *Haskell v. Marlow* (2) ([1928] 2 K.B. 45); (iii) that the view expressed by TALBOT, J., in *Haskell v. Marlow* (2) (*ibid.*, at pp. 58 and 59) as to the effect of a "fair wear and tear" exception is to be preferred to the views expressed by the members of the Court of Appeal on the same topic in *Taylor v. Webb* (1). Accordingly, counsel for the respondent submitted that if for any reason the case is referred back to the learned judge—though they were quite willing to accept his findings as they stood—he should be directed to reconsider the figure to be ascribed to the "fair wear and tear" exception in the present case in accordance with the view of TALBOT, J., just mentioned. I understand that your Lordships are all inclined, as I am, to accept the contentions just stated. I think, however, that in a case such as this, where the obligations of the tenant relate solely to the interior of the premises, where no question of interior decoration arises, and where "the premises" are a small modern flat, it can hardly make any difference to the practical result whether the judge applies the view of TALBOT, J., in *Haskell v. Marlow* (2), or the view of the Court of Appeal in *Taylor v. Webb* (1), and I am not surprised that counsel for the respondent are willing to accept his findings.

Two further questions were considered in the course of the argument. First, did the "fair wear and tear" exception in cl. 2 (C) of the tenancy agreement apply to the obligations imposed on the tenant by cl. 2 (E) and r. 1 of the schedule? This exception is not mentioned in either of these two parts of the document, but the obligations in cl. 2 (C) include an obligation "to keep the sanitary and water apparatus" of the flat "in good and substantial repair and condition", with a "fair wear and tear" exception. This being so, I think that the same exception must apply to the opening words of r. 1, down to "proper repair and order", since these words deal, in substance, with the same subject-matter. I do not think that this view is in conflict with the views expressed in the county court and the Court of Appeal. Even if the learned judge intended to apply the exception to the whole of r. 1, I do not think it likely that this error affected in any way the figure of £7 7s. already mentioned. The second question related to the effect (if any) of the circular letter, already set out, on the obligations of the tenant as to repairs. Counsel on both sides agreed, however, that, if your Lordships took the view with which I have just expressed my agreement, the duty as to washing or re-seating taps would be a "repair" to which the "fair wear and tear" exception applied.

For these reasons, my Lords, I would dismiss the appeal.

LORD TUCKER: My Lords, the main question in issue in this case in the Court of Appeal and as originally presented to your Lordships by counsel for the appellants was whether the learned county court judge had correctly construed the words "if under the terms of the tenancy the tenant is responsible for some, but not all, repairs" in para. 1 (3) in Part 1 of Sch. 1 to the Rent Act, 1957, for the purpose of fixing "the appropriate factor" with a view to determining the rent limit of the flat in question.

The contention was that the learned judge erred in including in the repairs for which the tenant was responsible under his tenancy agreement those repairs for which he would have been responsible at common law apart from and irrespective of his express obligations under his agreement. This raised a pure question of law of wide importance and eminently suitable for determination by the Court of Appeal. It was rejected—and in my opinion rightly rejected—by that court in the following words ([1958] 1 All E.R. at p. 518):

"The question is whether in law he could properly throw those occurrences

A into the tenant's scale as matters for which the tenant was responsible under the terms of the agreement. They were in fact matters for which he was so responsible. Counsel for the [appellants] argues that the tenant's liability for them at common law makes it incorrect to describe them as a responsibility under the terms of the agreement. We cannot accept that argument. Such repairs are in fact a responsibility under the express terms of the agreement.

B The fact that there may be a concurrent liability at common law does not alter that fact. If one applies the test of common sense and practice, one can hardly imagine a landlord claiming against a tenant in respect of them other than under the express covenant."

C My Lords, I start by asking myself what, apart from actions for waste, are the common law remedies of a landlord against a tenant for damage resulting from the negligent use of the demised premises by the tenant. Neither counsel was able to cite any case in which any such action had ever been brought. Negligence involves a breach of duty, and I should have supposed that the measure of that duty arising out of the relationship of landlord and tenant was to be found in the express terms of the contract between the parties or in the covenants which the law over the years has implied from that relationship in certain types of tenancy, e.g., the letting of furnished premises, weekly tenancies and yearly tenancies. However this may be, I will assume for present purposes that some such action would lie at common law either concurrently with the remedy for breach of contract or in lieu thereof where there is no express contract. In such an action, the tenant clearly would not be responsible for the negligent acts of his children or his guests, and for damage so caused the landlord would have to rely on his contractual rights. What should the county court judge have done with regard to repairs due to such causes? Should he have excluded them together with those which were due to the negligence of the tenant or his servants, or should he have made a separate calculation with regard to each category and have excluded one and included the other?

F My Lords, such problems do not, in my view, arise out of the language of the Schedule. The words "repairs for which the tenant is responsible" must have the same meaning in para. 1 (2) and para. 1 (3); it is only the quantum that differs. I can find no justification for giving the words "all repairs" any meaning other than their natural and ordinary meaning of all repairs whatever the cause of the disrepair and regardless of any concurrent remedies available to the landlord for the enforcement of the tenant's obligations. The only justification, as I understood the argument, for giving a limited meaning to the words was said to be found in the language of Part 2 of the Schedule and, in particular, in para. 15 thereof, which provides that references in that Part of the Schedule to defects for which the tenant is responsible are references to defects for the remedying of which, as between the landlord and the tenant, the tenant is responsible, or defects which are due to any act, neglect or default of the tenant or any person claiming under him or any breach by the tenant or such person of any express agreement. The precise effect of these words may require consideration on some future occasion when the cancellation of a certificate of disrepair is in question, but I do not think they can justifiably be called in aid in order to qualify the plain language of a different Part of the Schedule dealing with a different subject-matter, viz., the ascertainment of the appropriate factor as distinct from the procedure laid down in Part 2 for the abatement of disrepair and the grant and cancellation of certificates of disrepair. My Lords, I agree with the Court of Appeal in thinking that this contention of the appellants was rightly rejected by the county court judge.

I At a late stage of the hearing, counsel for the appellants advanced an alternative argument leading to the same result by a different process which does not involve doing violence to what I regard as the clear language of the Schedule. He said

that you look at the express language of the tenancy agreement to ascertain whether it falls within para. 1 (3) of the Schedule and, if it does, you then proceed to evaluate the quantum. This entails envisaging a hypothetical tenant and, in the present context, such a tenant is one who, throughout his tenancy, is never guilty of negligence in relation to his user of the premises and whose servants or agents are equally blameless. This tenant he described as "a reasonably careful tenant". Counsel for the respondent, whilst disposed to accept the description of the hypothetical tenant as "reasonably careful", submitted that such a tenant would from time to time be liable to fall below the standard of perfection required from counsel for the appellants' hypothetical tenant, and consequently a certain degree of negligence on his part or on the part of those for whom he is responsible is to be expected.

My Lords, as counsel on each side, by adopting the same words of description, arrive at such different results, it makes me doubt whether the words "a reasonably careful tenant" are very apt to describe this hypothetical person. However, as I understand some of your Lordships are of opinion that this is the proper test, I would not quarrel with this description, provided it is made clear that counsel for the respondent's interpretation is the right one and that perfection is not to be attributed to this hypothetical tenant who is, I think, to be taken to be of the type who may reasonably be expected to occupy identified premises in a particular locality on the terms of the agreement in question. I can find nothing in the judgment of the learned county court judge which leads me to doubt that this is the test which he applied. There is, in my opinion, no justification for inferring that he intended to attribute to the tenant all the acts enumerated by him towards the end of his judgment. They are merely examples of the kind of things some of which might be expected to occur during the tenancy and for which, if they did occur, the tenant would be responsible. I think the figure of £7 7s. at which he fixed the tenant's total liability makes this quite clear. Furthermore, the passage in his judgment where he says:

"I must, therefore, regard the agreement as one that repudiates specifically the assumption that tenants can be relied upon always to be careful. It assumes instead that there may be some who are not",

although founded on the language of the particular agreement, clearly indicates the type of hypothetical tenant envisaged by him. It is said that, unless you exclude repairs due to negligence, it follows that the greater the degree of negligence attributed to the hypothetical tenant the lower will be his rent. If this is illogical it is the fault of the statute, and is no justification for reading into the Act words which are not there or endeavouring to reach the same result by assuming a perfect tenant and concealing his perfection by describing him as "reasonably careful". Surely there can be no justification for assuming that the conduct of the tenant will be either extremely good or extremely bad, and it would seem to be equally illogical that the better his anticipated conduct the higher will be his rent. To me the conclusion seems irresistible that the hypothetical tenant must be the ordinary average man with all his imperfections and liability occasionally to fail to maintain that standard of care which the law requires of him in his relation to his neighbours.

With regard to the application of the fair wear and tear exceptions, I agree that the judgment of TALBOT, J., in *Haskell v. Marlow* (2) ([1928] 2 K.B. 45) is to be preferred to the judgments of the Court of Appeal in *Taylor v. Webb* (1) ([1937] 1 All E.R. 590) in so far as questions of principle are involved and that, to this extent, the latter case should be regarded as overruled. I find it difficult, however, to ascertain in what way the application of the decision in *Taylor v. Webb* (1) affected the computation made by the learned judge, and I agree that, if he erred at all, it was probably in favour of the appellants.

My Lords, with regard to the question of the application of the fair wear and

A tear exception to r. 1 of the schedule to the tenancy agreement, and to the criticism directed to the inclusion of some of the specific items enumerated by the county court judge, I am in agreement with the views which have been expressed by my noble and learned friend on the Woolsack and have nothing to add thereto.

For these reasons, I would dismiss the appeal.

B **LORD KEITH OF AVONHOLM:** My Lords, this appeal falls to be decided, in my opinion, on a very short point. The question is how the county court judge is to determine the basic rent of the demised premises, having regard to the terms of the tenancy agreement. This is not a matter on which absolute precision is possible in the intermediate class of case where the tenant is liable for some, but not all, repairs as here. At opposite ends of the scale no difficulty arises. If the tenant is liable for no repairs, the "appropriate factor" is two (s. 1 of the Rent Act, 1957). If the tenant is liable for all repairs the "appropriate factor" is four-thirds (para. 1 (2) of Sch. 1). In the intermediate class, the "appropriate factor" has to be determined by the county court and, if the judge proceeds on proper principles, his figure can hardly be challenged.

D In the present case, the learned county court judge, in the course of his judgment, said this:

E "There is, however, a further consideration that I am asked to take into account regarding repairs arising through negligence, and it is this. It is submitted that in construing this agreement it should be assumed that the tenant will be a reasonably careful tenant, that is to say, not a negligent one, and that the negligence clause can therefore be disregarded. It might be possible to accept this argument in the case of an agreement that was silent as to the tenant's negligence. It might then, I think, be argued that it should be assumed that when the agreement was drawn up the landlord had in mind only tenants who would behave with reasonable care, but this agreement is not silent; it quite obviously assumes and takes into account the possibility that the tenant or his servants may be negligent and it formulates provisions to apply in such a case. I must, therefore, regard the agreement as one that repudiates specifically the assumption that tenants can be relied upon always to be careful. It assumes instead that there may be some who are not."

G From his catalogue in a later part of his judgment of the sort of things that happen it is clear, I think, that, to some extent, he has applied the view so expressed. In my opinion, he has here misdirected himself.

H The question, as I see it, is not what the particular tenant would be responsible for in the event of his negligence. Even if he were under no repairing obligations he would, in my opinion, be liable for disrepair caused by negligent treatment of the demised premises. The question is how is the quantum of repair to be fairly allocated between landlord and tenant in light of the repairing covenants imposed by the tenancy agreement? The terms of the agreement are material as showing the scope of the repairs that may be expected to fall on the landlord and tenant respectively.

I There are references in r. 1 of the schedule of rules and regulations to negligence of tenants or their servants. These, I think, refer to negligence in the use of baths and other sanitary fittings, and seem intended to cover consequential damage to the demised premises or to other flats. This seems a very natural clause for the protection of the landlord, though it adds, I think, nothing to the liability which would attach to the tenant in any case apart from the clause. The reference to "other flats" would seem also to put it into a special character of stipulation outside the ordinary repairing covenant. But, whatever the clause means, it cannot be taken to warrant the assumption that the landlord

contemplates a negligent tenant or is granting to the tenant a charter to be negligent. A

It was accepted as common ground and, in my opinion, rightly so, that the tenant to be regarded is not any particular tenant, but a hypothetical tenant. That tenant must, in my opinion, be taken to be a reasonably careful tenant not given to acts of negligence in his treatment of property or to untenant-like conduct. That is not to say that regard may not be paid to the ordinary mischances and accidents that may occur in any house from inadvertence. The assumption of such a hypothetical tenant is, in my opinion, a necessity to give any coherence or certainty in the operation of the provisions of the Act. The appropriate factor cannot depend on the reputation of the particular tenant, or on the neighbourhood in which the dwelling-house is situated, or on an estimate of the conduct of people who stay in or are allowed to visit the house. If negligence were to be treated as a matter to be taken into account, how much negligence is to be assumed? The repair bill is clearly going to vary in proportion to the estimate of the amount of negligence. Some tenants might be grossly negligent, some might be less negligent and some might not be negligent at all. It is impossible to strike an average of negligence and, even if it were, it would not be appropriate to all types of tenant and all classes of property. To introduce negligence would also mean that a negligent tenant would benefit by getting a lower appropriate factor and the greater the negligence assumed the lower would be the appropriate factor within the statutory limits. Negligence must, in my opinion, be entirely excluded in computing the appropriate factor. The appropriate factor must be computed on the assumption of a tenancy by a hypothetical tenant removed from all considerations of negligence. B C D E

I would, accordingly, allow the appeal, and remit the case to the county court for further consideration. On the other points in the case I agree with what has been said and have nothing to add.

LORD DENNING: My Lords, we are here concerned with the rent which should be paid by the tenant of a small flat which is still controlled by the Rent Acts. In the Rent Act, 1957, Parliament has done away with the old standard rent, and has prescribed instead a "rent limit" for controlled houses. It has laid down a formula for calculating this "rent limit". This formula, naturally enough, takes account of the "responsibility for repairs". The rent limit goes up or down according as the burden of repairs falls on the landlord or the tenant. This adjustment up and down is effected by means of a variable multiplier called the "appropriate factor" which works in this way: In applying the formula, you start with the 1956 gross value of the dwelling. Then you multiply it by 2 or by $1\frac{1}{3}$ —or by something in between—according to the "responsibility for repairs". You find this multiplier by seeing what is the responsibility for repairs which falls on the tenant under the terms of the tenancy. If the tenant is responsible for all repairs, the multiplier is $1\frac{1}{3}$. If he is not responsible for any repairs, the multiplier is 2. If he is responsible for some, but not all, repairs, the multiplier is such number less than 2 but greater than $1\frac{1}{3}$ as may be agreed by the parties or determined by the county court. F G H

The formula does not thus far take any notice of the responsibility of the landlord for repairs; but it is to be observed that the Act contains provisions whereby "in case of disrepair" the tenant can get the multiplier reduced to $1\frac{1}{3}$. The result is that, if the landlord wishes to receive the full rent permissible under the rent limit, he must remedy any defects for which the tenant is not responsible. One other thing to be noticed is that the expression "repairs" in the formula does not include internal decorative repairs. If, under the express terms of the tenancy, the landlord is responsible for internal decorative repairs, he can put up the multiplier by another $\frac{1}{3}$, so that the top multiplier, for instance, becomes $2\frac{1}{3}$ instead of 2. I

A So far there is no difficulty. The trouble arises when you ask—What is the proper way to calculate the “appropriate factor”? It is easy enough at the two extremes. When the tenant is under an express obligation to keep the dwelling “in repair”, or “in good repair”, or “in good tenantable repair”, or “in good and substantial repair”, or any such like phrase (with no exception for fair wear and tear or anything else), the multiplier is $1\frac{1}{2}$. When the tenant is not under
B any express obligation to do any repairs at all, the multiplier is 2. But what is the position when the tenant is expressly liable for “some, but not all, repairs”, as, for instance, in the ordinary case when he is liable to keep the premises in good repair, fair wear and tear excepted? The Act says that, in the absence of agreement, the county court judge is to determine the “appropriate factor” but gives him no guidance as to how to do it.

C It is, I think, plain that you must take a hypothetical tenant and assess the responsibility for repairs by estimating what would be the annual cost of the repairs falling on him and what on the landlord. But this leaves the question—What sort of hypothetical tenant are you to take? Are you to take a rough tenant who knocks the place about? or a perfect tenant who never breaks anything? or an average tenant who comes somewhere in between? Or, to
D put the question in another way—What defects are you to take into account in making the calculation? In particular, are you to take into account breakages due to the tenant’s fault? Suppose, for instance, that the tenant negligently drops a bottle into the washhand basin and breaks it; or suppose that he does not keep his children under proper control and one of them throws a stone through the window. Are you to take breakages of that kind into account when ascer-
E taining the rent limit? A rough tenant will have a lot of such breakages. A perfect tenant none. An average tenant will have some but no one can say how many. If breakages of this kind are to be taken into account, it will produce a strange result. The judge will have to estimate the annual cost of such breakages to the average tenant and bring it into the calculation in the tenant’s favour (as being part of the repairs for which the tenant is responsible) with the result
F that the tenant will pay a lower rent on account of them. I can see no sense in this. I can see no reason why the landlord should receive less rent—or the tenant pay less rent—simply because the tenant may be expected, in the ordinary course of things, to break windows, wash-basins and the like.

After a close consideration of the Act, I have come to the conclusion that, in calculating the rent limit, you ought not to take into account breakages
G which are due to the tenant’s own fault; for the simple reason that the Act envisages a hypothetical tenant who uses the dwelling in the way that he ought to use it—in the way that the common law expects and requires him to use it—that is to say, a tenant who commits no waste (by which I mean no voluntary waste) and who uses the dwelling in a tenant-like manner, and who does not break any agreement he has made as to his use of it. Such a tenant—you may
H call him a perfect tenant if you like but I would call him a reasonable tenant—does not damage the place, wilfully or negligently, he does not break windows or wash-basins, or if he does, he puts it right at his own expense without troubling the landlord about it.

To prove that such is the kind of tenant envisaged by the Act, I would first take a case where the tenancy agreement contains *no express provision* about
I repairs at all. It was conceded on all hands that in such a case the multiplier is 2. The reason is because there is no term of the tenancy—express or implied—which requires the tenant to do any repairs at all. He is not, therefore, under the terms of the tenancy, responsible for any repairs—not even for “some” of them. But, nevertheless, he is, by the common law, under an obligation not to commit waste, that is to say, voluntary waste; and he is also under an obligation to use the premises in a tenant-like manner. As I pointed out in *Warren v. Keen* (5) ([1953] 2 All E.R. 1118 at p. 1121), those are not obligations to repair. They are

obligations as to his conduct and user of the premises, and, so long as they are fulfilled, as they ought to be, no question of repair arises. It is true, of course, that if the tenant breaks those obligations—as, for instance, if he commits waste by removing partitions or walls (*Marsden v. Edward Heyes, Ltd.* (6), [1927] 2 K.B. 1) or if he uses the premises in an untenant-like manner by breaking windows or doors (*Ferguson v. Anon.* (7) (1797), 2 Esp. 590)—he must execute repairs or else pay damages. But in doing so he is not fulfilling an obligation to repair under the terms of the tenancy, express or implied. He is only remedying his own breaches of his common law obligations as to conduct and user. These obligations are altogether separate and distinct from those imposed by a covenant to repair and give rise to separate and distinct remedies: see *Kinlysie v. Thornton* (8) ((1776), 2 Wm. Bl. 1111), a case of waste, but the same applies, I think, to use in a tenant-like manner. I do not think *Standen v. Chrisnas* (9) ((1847), 10 Q.B. 135) was correctly decided on this point. Take next a case where the tenant *expressly* agrees not to commit waste and *expressly* agrees to use the premises in a tenant-like manner. The multiplier is still 2. It would obviously not be right to reduce it simply because the tenant's obligations are express and not implied or imposed by law.

It is quite clear, therefore, that the landlord is given the multiplier of 2 on the basis that the hypothetical tenant is a tenant who commits no waste and uses the premises in a tenant-like manner; and that, if the tenant breaks those obligations, he remedies them at his own expense without any effect on the rent. Thence the multiplier goes down on a sliding scale from the highest factor 2 to the lowest factor $1\frac{1}{3}$; but it is obvious that it must proceed on the same basis all the way down the scale—namely, that at every point the hypothetical tenant must fulfil his common law obligations as to conduct and user and must, therefore, himself remedy defects due to his own fault—and that he is only entitled to have the rent limit reduced by a lower factor than 2 according as more and more repairs fall on him by the express terms of the tenancy over and above those due to his own fault.

There is another reason why I say the Act envisages a tenant such as I have described. If you turn to the provisions which enable a tenant to get the rent limit reduced “in case of disrepair”, you will find that he cannot get it reduced for breakages due to his own fault—see para. 4 (4) and para. 15 of Sch. 1. The underlying assumption clearly is that, during the continuance of the tenancy, the tenant should remedy his own breakages himself at his own expense without affecting the rent limit at all. If that assumption is to be made when *continuing* the rent limit, surely it should also be made when *fixing* it. It would be absurd, *after* the tenancy has started, to reduce the rent because the tenant breaks the washhand basin. So, also, it would be absurd, *before* the tenancy has started, to fix the rent at a reduced level because the tenant—or rather a hypothetical tenant—might thereafter break a wash-basin.

Counsel for the respondent objected to this line of argument. He said that para. 15 is confined to “this Part of this Schedule”, i.e., to Part 2, which deals with abatement for disrepair; and that it cannot be called in aid to construe Part 1, which deals with adjustment of rent limit. This is, I think, too narrow a view. The provisions of Part 1 can only properly be understood when they are placed in the context of the Act as a whole, and this includes Part 2. Take, for instance, the question whether, in ascertaining the appropriate factor for a flat, it is permissible to take into account the cost to the landlord of repairing any defects in the common roof or staircase. There is nothing to help in Part 1. The “responsibility for repairs” ordinarily means repairs to the dwelling itself which is let. But in Part 2 there is para. 13 (also expressed to be “for the purposes of this Part of this Schedule”) which shows that, in a block of flats, any disrepair of the common roof or common staircase is to be treated as disrepair of the dwelling and entitles the tenant to a reduction in the rent limit. The landlord must, therefore, remedy any defects in the common roof or staircase

A if he wants to keep his full rent. It is reasonable to infer that the cost of this work is part of the burden of repairs which falls on the landlord and must be taken into account in the calculation so that he gets a higher rent on account of it. It was so taken into account by the judge in this very case, and he relied on para. 13 for the purpose. I think he was right in so doing. And para. 15 can likewise be used so as to show what breakages can properly be taken into
B account. I decline to put on one side a most useful pointer to the intention of Parliament which is contained in this very Act.

Thus far I have considered only breakages due to the tenant's own fault, that is, damage done to the dwelling by the tenant himself, wilfully or negligently. Such damage is clearly a breach of his common law obligations and must be excluded from the calculation for the reasons I have given. But what about
C breakages due to the fault of his family or his guests? These seem to me to stand on the same footing as his own breakages. No reasonably-minded tenant expects his landlord to pay for breakages caused by the negligence of himself or his family or his guests. He expects to pay for them himself; and in law he is, I think, bound to do so without any express stipulation on that behalf. This is because he is under an obligation to use the dwelling in a tenant-like manner,
D and this obligation, properly understood, extends not only to his own use of the dwelling but also to the use made of it by those claiming under him. After all, if they do damage to the premises, wilfully or negligently, the tenant can recover the full damage from them. He can rely on his possession for this purpose; for as against them, his possession is title. (He is, of course, unable to sue his wife, but that is a rule of procedure, not of substance; and does not affect the principle.) It is only reasonable, therefore, that the tenant should
E be accountable to the landlord for the damage done by them. This was clearly the view of the experienced surveyor for the respondent, Mr. Russell-Davies, who said in evidence: "I had no thought that anybody but the tenant would be liable for rough treatment or negligent treatment". It was the same view as I expressed a few years ago in *Warren v. Keen* (5) ([1953] 2 All E.R. at p. 1121)
F when, speaking of the tenant's obligations, I said:

"... he must not, of course, damage the house wilfully or negligently; and he must see that his family and guests do not so damage it—if they do, he must repair it."

It follows that the hypothetical tenant envisaged by the Act is a tenant who does
G not himself damage the dwelling, wilfully or negligently, nor does anyone claiming under him so damage it; and the rent limit must be calculated on that footing. This fits in well with para. 15, which says that the tenant cannot get the rent limit reduced for "defects which are due to any act neglect or default of the tenant or any person claiming under him". I would also point out that, if the tenant expressly agrees to use, or not to use, the premises in a particular
H way, as for example, not to drive nails into the wall—and he breaks his agreement—he cannot bring in the cost of remedying it as an item in his favour. He cannot get the rent limit reduced on that account: see para. 15; and he cannot claim to have a lower rent fixed on account of it—or the possibility of a hypothetical tenant doing it.

The next question is what is the effect of the exception of "fair wear and tear"
I in a repairing covenant. I find myself in full agreement with what TALBOT, J., said on this subject in *Haskell v. Marlow* (2) ([1928] 2 K.B. 45 at p. 59). I think the Court of Appeal in *Taylor v. Webb* (1) ([1937] 1 All E.R. 590) were wrong in overruling *Haskell v. Marlow* (2). I have never understood that, in an ordinary house, a "fair wear and tear" exception reduced the burden of repairs to practically nothing at all. It exempts a tenant from liability for repairs that are decorative and for remedying parts that wear out or come adrift in the course of reasonable use, but it does not exempt him from anything else. If further damage is likely to flow from the wear and tear, he must do such repairs as are

necessary to stop that further damage. If a slate falls off through wear and tear and in consequence the roof is likely to let through the water, the tenant is not responsible for the slate coming off but he ought to put in another one to prevent further damage. A

The third question is whether r. 1 is subject to the exception of "fair wear and tear". In so far as the rule covers the same field as cl. 2 (D)—that is, in respect of sanitary and water apparatus—it is subject to the exception, because the clause in the deed must take precedence over the rule. It follows that, when the washer on a tap wears out and has to be remedied, or a cistern has to be regulated, or a radiator leaks, the tenant is not liable, because it is fair wear and tear. The defect must be made good by the landlord if he wants to get his full rent. It is part of the burden which falls on him. The circular which the appellants sent round to the tenants recognises this burden and does not need separate consideration. In so far as the rule refers to damage occasioned by improper use or negligence of the tenants or their servants, this is not "fair wear and tear" and the tenant must put it right; but the cost does not come into the calculation for the reasons I have already given. In so far as the rule refers to notices served by the water and sanitary authorities, these are all due, as Mr. Dale said, "to plumbing and to leaks", that is, to sanitary and water apparatus. These are, therefore, like the first part of the rule, subject to the exception of fair wear and tear, and the cost of remedy forms part of the landlord's burden. B C D

This brings me to a consideration of the judgment of the county court judge. He seems to have made his calculation in this way: (i) He took the estimated annual cost of repairing the roof and exterior of this block of flats and of the common lifts and staircases: and he apportioned it to this flat. The figure came to £5 10s. He held this was a burden resting wholly on the landlord. This was clearly right. (ii) He took the estimated annual cost of repairing the inside of the flat (excluding decorative repairs) including fair wear and tear but *excluding damage due to negligence*. This figure was given by Mr. Dale at £4 5s. and seems to have been agreed by the parties. The judge held that £1 15s. of it rested on the landlord (presumably for fair wear and tear) and £2 10s. on the tenant (of which 10s. was under his general covenant to repair and £2 under r. 1). I doubt whether the judge was right about this £2. The figure was given by Mr. Dale who said £2 would be spent on washing the taps and regulating the cistern. This looks to me like fair wear and tear and, if so, it should rest on the landlord. (iii) He took the estimated annual cost of repairing breakages, such as cracked washhand basins, broken windows, bath panels, and so forth, due to *carelessness*. He had no evidence before him on which to estimate the figure but he put it at a figure of £7 7s., less the £2 10s., namely, at £4 17s. He held that this was a burden resting wholly on the tenant. I do not think the judge was right about this. He ought to have excluded all damage and breakages due to any act, neglect or default of the tenant or any person claiming under him. Also all damage, such as driving nails into the walls, which was due to any breach of the clauses in the tenancy agreement. Incidentally, I notice that both surveyors said they would not like to estimate damage due to negligence, because it depended so much on the particular tenant. By which I take it there is no average tenant for this purpose. The right way to deal with it is to exclude negligence altogether. E F G H I

In view of these errors by the county court judge, I think the proper course is to send the case back for the calculation to be made afresh. I agree with the views expressed by my noble and learned friend, LORD KEITH OF AVONHOLM, and I would allow the appeal accordingly.

Appeal dismissed.

Solicitors: *Stikeman & Co.* (for the appellants); *Graham Page & Co.* (for the respondent).

[Reported by G. A. KIDNER, ESQ., Barrister-at-Law.]

A

RICHARDS v. RICHARDS.

[COURT OF APPEAL (Hodson, Morris and Ormerod, L.JJ.), October 28, 29, 30, 1958.]

B

Husband and Wife—Property—Matrimonial home—Purchase by wife and her parents as home for themselves and for husband and wife and their child—Husband absent on naval service—Monthly allotments from his pay to wife—Deposit, mortgage payments and repairs paid from wife's bank account—Contributions by her parents towards mortgage payments—Whether husband part owner of house—Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 17.

C

A husband and wife married in 1943 made their matrimonial home at the wife's parents' home, the husband being in the Royal Navy and so away except when on leave and during breaks in service, and the wife engaging in air raid precautions work until a few months before the birth of a daughter in September, 1944. After demobilisation the husband continued to be in the navy and away from home on service. In 1949, the parents' home being required by the owner, another house was purchased in the names of the wife and her father and it became the home of the wife and child and her parents.

D

Of the price of £4,100 part was raised by mortgage, and the deposit of £1,000 and the legal and other expenses were paid by the wife out of one of her bank accounts, she receiving £200 from her mother. The father and mother both contributed but the amount of the contributions was uncertain. The wife

E

had had an account before marriage and had regularly paid into her account earnings from air raid precautions work and monthly naval allotments credited to her by her husband out of his service pay, which rose from £12 a month initially to £16 and £21 and were £28 monthly at the time of the purchase of the house. The husband, who was in Singapore, was unaware of the purchase at the time when it was made and expressed his delight

F

in a letter in which he asked the wife to accept £150 as a "small contribution" and suggested buying a Hoover and lawn mower with it. He increased his monthly naval allotment from £28 to £34 and he made subsequent increases to £38 and £42, his service pay being increased from time to time. The wife also received money from lodgers and some financial help from her parents towards the monthly mortgage payments, repairs, etc., which she paid by cheque out of her account. After the husband's return in 1956, and following a petition for divorce presented by the wife in 1957, the husband took out a summons to determine whether he was entitled to a share in the house.

G

Held: the husband had no beneficial interest in the house because—

H

(i) the house was bought without his knowledge as a residence for two families, viz., (a) the wife's parents, and (b) the wife, her husband and daughter; and, in so far as moneys previously paid by the husband to the wife might have been used to pay for the purchase, they were moneys paid unconditionally to the wife for which she was not accountable to the husband, and

I

(ii) the subsequent continuance of and increases in the husband's monthly allotments to the wife did not introduce him into beneficial ownership of the house.

Silver v. Silver ([1958] 1 All E.R. 523) considered.

Appeal dismissed.

[As to the rights of husband and wife in the matrimonial home, see 19 HALSBURY'S LAWS (3rd Edn.) 849, para. 1388; and for cases on the subject, see 27 DIGEST (Repl.) 264, 2130 and Supplement.

For the Married Women's Property Act, 1882, s. 17, see 11 HALSBURY'S STATUTES (2nd Edn.) 804.]

Cases referred to:

- (1) *Silver v. Silver*, [1958] 1 All E.R. 523.
- (2) *Rimmer v. Rimmer*, [1952] 2 All E.R. 863; [1953] 1 Q.B. 63; 3rd Digest Supp.
- (3) *Blackwell v. Blackwell*, [1943] 2 All E.R. 579; 27 Digest (Repl.) 105, 778.

Appeal.

The husband, Robert Charles Richards, took out a summons under the Married Women's Property Act, 1882, to determine as between himself and his wife, Dorothy Kate Richards, whether he was entitled to a share or interest in a house, 3, Makepeace Avenue, Highgate, in the county of London and in a Hoover vacuum cleaner and a rotary iron. The parties were married on Jan. 2, 1943. The husband had been in the Royal Navy since 1940 and was then a sub-lieutenant, and the wife was engaged in air raid precautions work. They made their matrimonial home with the wife's parents at 63, Swains Lane, though the husband was there only when on leave. The wife continued her work until March, 1944. On Sept. 18, 1944, a daughter was born, the only child of the marriage. In 1946 the husband was released from service in the Royal Navy, but rejoined shortly after and was at sea for the greater part of his time until 1948, when he was appointed to a shore-based position in Singapore.

In May, 1949, the owner requiring the house in which the wife's parents lived, 63, Swains Lane, another house, 3, Makepeace Avenue, was purchased in the names of the wife and her father, Mr. Alford, subject to a mortgage with a building society, and the wife and daughter and the wife's parents moved there and made it their home. The husband was informed. In May, 1951, he returned from Singapore to live with the wife at the new home, but in July, 1951, he went back to sea-going appointments, spending his periods of leave with the wife. In October, 1954, Mr. Alford, the wife's father, died. In April, 1956, the husband concluded his service at sea and returned home. Following differences and difficulties, the wife presented a petition for divorce on Feb. 1, 1957, and on Feb. 11, 1958, she was granted a decree nisi of divorce which was made absolute on Mar. 31, 1958. The husband's summons under the Married Women's Property Act was dated Mar. 19, 1957.

For some years before her marriage the wife had a Post Office Savings Bank account. Money which she had received by way of payment for her work in air raid precautions went in part into that account, and shortly after her marriage, it was some £288 in credit. She transferred all the money to an account which she then opened at Barclays Bank and closed the Post Office Savings Bank account. Thereafter, from April, 1943, onwards, while her husband was serving, her Barclays Bank account was credited month by month with sums called naval allotments, which her husband caused to have credited to her out of service pay to which he became entitled. Starting at the rate of £12 a month, then rising to £16, then to £21, the rate in the early part of 1949 was £28 a month.

In July, 1945, the wife opened a new Post Office Savings Bank account. From the sums standing to her credit with Barclays Bank, the wife transferred £100 to open her Post Office Saving Bank account and on Feb. 5, 1946, and on Nov. 14, 1947, she transferred further sums of £300 and £100. The husband paid various sums into the Post Office Savings Bank account which he had. In June, 1948, he withdrew sums of £150 and £30, which he transferred to the wife's Post Office Savings Bank account. The wife paid other amounts into her Post Office Savings Bank account, which, by April, 1949, was nearly £870 in credit. The wife's father did not have a separate bank account.

In the bank statements of the wife's Barclays Bank account, various entries related to the purchase of the new house, 3, Makepeace Avenue, in 1949. Cheques were drawn for sums of £200, £353 odd, and £747 odd. The wife withdrew £717 from her Post Office Savings Bank account, and this amount was credited to her Barclays Bank account. An amount of £200 also credited to that account was

A said to have come from her mother. The origin of another credit of £190 was not clear, but no specific sum came into her Barclays Bank account at that time from the husband, in reference to the purchase of the house, he being then unaware of the purchase. The wife stated that the purchase price of the house was £4,100, of which £1,000 was paid by way of initial deposit, the balance of £3,100 being furnished by the building society. There were also legal charges and payments B to the vendor for certain fixtures or contents. After the purchase, monthly mortgage payments of £18 19s. 9d. had to be made to the building society and certain outgoings had to be met including necessary payments for repairs. The wife made the payments by cheques drawn on her Barclays Bank account. She received money from lodgers and some financial help from her parents. Her husband's naval allotments to her were credited continuously to the account. C On becoming aware of the purchase of the house, the husband had increased the rate of monthly naval allotments from £28 to £34, and he increased it to £38 in November, 1950, and to £42 in April, 1952, his rate of pay being increased from time to time. These naval allotments ceased when he left the service in 1956. Mortgage payments to the building society still continued to be payable.

The wife and her father and mother made the decision to purchase the new D house, 3, Makepeace Avenue. In her evidence before the learned registrar the wife said:

"We decided (that is to say, father, self and mother) to go in for a house together. I wanted to put roots down somewhere."

The husband was not consulted about the purchase, and it was a surprise to him.

E He was told by his wife in a letter, and in a letter on Apr. 10, 1949, he wrote:

"Your letter arrived telling me all the wonderful news late last night, and I am absolutely thrilled to bits with your decisions. Your judgment has always been far better than mine, as proved in the past. I'm very glad you took action whilst the iron was hot without first consulting me. My big regret is that I am not handy to render any assistance to you all with the moving, F etc. I think I have read your letter through at least a hundred times since last night, and I get more and more thrilled each time I read it . . . [Gran and Pop's] offer to pay £2 10s. per week to help us with the mortgage is to my mind fantastic in its generosity which only goes to show what a couple of good scouts they really are . . . This big change in our lives has given me something to strive for now, and I am going to save every penny I possibly G can. Since I have been out here I have built up my small Post Office account to over £80 and by the end of this month I hope to get it into three figures . . . I am managing to save on an average between £15 and £20 each month so you see I'm not all that extravagant. I am going to have paid into your account another £6 each month as from the 1st May. This is not much, H darling, but it will possibly help a little to keep our heads above water. I will continue to save all I can . . . The £150, if you will accept it, I would like you to accept as a small contribution, for your capital must have been knocked for an awful six, and may I suggest that it provide a Hoover and lawn mower which you say would be a help to you."

The £150 was the £150 transferred from the husband's Post Office Savings Bank account to the wife's. The Hoover was one of the chattels in issue, which the wife I then regarded as belonging to the husband. The registrar in his judgment said:

"I accepted the wife's evidence that in her letters she was saying that she and her father were buying the house and I rejected the husband's evidence that the wife had said in her letters that it was a gift to them. I found that the husband's letters at that time were presumptuous, and that he was intentionally putting a false interpretation on his wife's letters to him. In my view, his contention that he thought that the wife's father was acting as his 'proxy' in the purchase, a matter which he never mentioned to him on

his return to England, was quite untenable. I was satisfied that the husband was well pleased with the arrangement by which this home was being provided at small cost to himself. Throughout his service in the navy the husband had been making a monthly allotment to the wife, small at first but increasing with his promotions. There was, however, never any plan between husband and wife for saving for a home and I felt that he was largely indifferent as to exactly how she spent his money or how much of his wife's own savings or how much of the money he had sent home was used in the purchase. As a matter of family convenience, the wife acted as banker both for her husband and her father and this led to difficulties in tracing precise payments through her accounts. I was, however, fully satisfied that the house was purchased with money provided by the wife and her father as joint tenants and that in so far as any of the money provided by the wife originated from the husband there was no evidence to rebut the inevitable presumption of advancement. I gave considerable attention to the husband's contentions arising from payments undoubtedly made out of his money for mortgage interest and repairs and improvements. In my view there was nothing in the character of this expenditure to take it out of the scope of what might reasonably be expected of the husband in maintaining his wife; and it did not create any beneficial interest or right to repayment."

The registrar held that the rotary iron was paid for in equal shares by the husband and the wife and was a parting present to the wife on his rejoining ship and that the vacuum cleaner was purchased by the wife out of money provided by the husband in replacement of money expended from her own savings at the time of purchasing the house. He therefore held that the wife was beneficially entitled to the house and chattels. By his appeal the husband asked that it should be adjudged that he and the wife were beneficially entitled to the house and the chattels in equal proportions.

A. L. J. Lincoln for the husband.

R. G. Dow for the wife.

Cur. adv. vult.

Oct. 30. **HODSON, L.J.:** I will ask **MORRIS, L.J.**, to deliver the first judgment.

MORRIS, L.J., stated the facts and continued: Whatever may have been the husband's understanding of the matter at the time, it is quite clear that the purchase of the house was made without any reference to him and that it was in the names of the wife and her father. There was no evidence of any discussion between her and the husband as to the purchase of a matrimonial home. There had never been any plan or arrangement pursuant to which any fund of money should be created or built up in order that a matrimonial home should be purchased. The evidence points to the conclusion that the wife was to continue to live with her parents. The husband had rejoined the navy after being demobilised, and then in 1948 had been appointed to a shore-based position in Singapore.

In these circumstances the present case is not one where, as in *Silver v. Silver* (1) ([1958] 1 All E.R. 523) arrangements at the time of purchasing a house in the name of a wife were made with the concurrence of a husband. Nor is it a case where, as in *Rimmer v. Rimmer* (2) ([1952] 2 All E.R. 863), both husband and wife had a part in arrangements made when a house was bought in the name of the husband, which house was to serve as their matrimonial home. Here the husband knew nothing about the purchase until it had been made and it was not made pursuant to any pre-arranged plan.

[His LORDSHIP read the judgment of the registrar, p. 515, letter I, ante, to letter D, supra, and said:] The reference [in the registrar's judgment] to the way the wife spent "his" money was pointed to by learned counsel as denoting that there was money which was money of the husband. Whether that was so is one of

A the questions which calls for consideration in this appeal. The passage relating to the wife's acting as banker for the husband is referred to by counsel for the husband, who submits that, if the wife was banker for her husband, then the money remained his. Counsel further submits that there was no presumption of advancement. Those are matters which call for consideration.

[HIS LORDSHIP said that he agreed with the decision of the registrar that the vacuum cleaner and the rotary iron belonged to the wife, and that decision could not be disturbed. He continued:] I now come to consider the really important issues which relate to the beneficial interest in the house. It is necessary, I think, to consider how the matter stood when the purchase was first made and then to consider whether the position is affected by later events. Inasmuch as at the time when the house was bought the husband knew nothing about it and had no part at all in it, there is no room for any suggestion of a gift being made by him to his wife. It is said, however, that payments made by the wife when the house was bought were partly made out of money which had been provided by the husband. It is said that as a result the husband is entitled to a share in the beneficial interest. But, in regard to this contention, there are two observations to be made. In the first place, the present is not a case where parties D to a marriage have by their joint efforts saved money in order to buy a house. In the second place, it does not seem to me to be shown that any of the money expended when the house was bought was money which then belonged to the husband. I leave out of account for the moment the question as to exactly what payments were made by the wife's mother and father. The facts are not clear, but it appears that the mother probably contributed £200 and that the E father may have contributed something. If they did contribute, and if there is no assertion of a beneficial interest having belonged to them (as to which we are not called on to adjudicate), then any gifts made by them would in all probability have been made to their daughter rather than to their son-in-law. But one of the chief questions is whether the money in the wife's bank account belonged to her, or whether any part of it was held by her either for her husband or for them both jointly. I consider that the approach to this matter and its F determination depend on a consideration of the facts and of such inferences as can properly and reasonably be drawn from them.

It seems to me that the reasonable inference in this case is that the amount of the naval allotment was paid by the husband to the wife in such a way as to be beyond recall by him and as not to require any accounting by her. The G husband was far away from home. The amounts were for the wife to spend as she should decide. The wife had to depend on them for all her needs. They were not payments by way of housekeeping allowance, and the decision in *Blackwell v. Blackwell* (3) ([1943] 2 All E.R. 579) does not seem to be applicable. The situation was not one in which husband and wife were able from day to day to lead joint lives. The husband did not expect to be asked for more money nor would he H demand to know how the money had been spent, or whether it had all been spent. I think that it would have been irrational in the circumstances in which the parties were placed, and in the absence of some specific arrangement, if the husband had regarded the sums as being other than absolutely for the wife's disposition and keeping. If she was frugal and self-denying, the surplus would be hers. Also the bank account was opened with money which was her own. Some I small part of that money came from wedding presents, and, even if there is any doubt about that part of it, the bulk of the money was unquestionably the wife's own money. There was no plan made for the building up of some joint financial reserve. Even though the husband may have felt that the amounts of the naval allotments exceeded the wife's probable needs, I cannot think that it would have been in tune with or in accord with their common understanding if the husband had asked for an account of expenditure or a measuring of outgoings against the totals of the naval allotments.

I think that this view is borne out by the reference in the letter of Apr. 10, 1949, A
to the wife's capital. The words were:

"The £150, if you will accept it, I would like you to accept as a small
contribution, for your capital must have been knocked for an awful six . . ."

It seems to me, therefore, that it cannot be said that any money of the husband's B
was expended in paying the deposit on the house. There was some money that
had become the wife's money because she had saved it out of what was hers to
spend. Some of her money had come from her husband, but there were no
conditions, express or implied, which limited or restricted her rights in it. It seems
to me, therefore, that, when the house was first bought, the husband did not have
any beneficial interest in it.

The next question is whether this position was later altered in any way. So far C
as the legal title is concerned, no change was made. It is, however, true that the
husband increased the amount of his allotment when he knew of the purchase and
knew that mortgage payments had to be made. Referring again to the letter
of Apr. 10, 1949, there are the phrases "Gran and Pop's generosity towards
us", "to help us with the mortgage", and the reference to the husband's en- D
deavour to save as much money as he could. Coupled with that reference to saving
is, of course, a reference to his own separate bank account, viz., his Post Office
Savings Bank account. All that happened after the purchase of the house was
that the husband made payments to his wife in the same manner as before, and
it is difficult to accept that at the later stage he became introduced into beneficial
ownership. He came to know that the house had been bought in the name of his
wife and her father, but the learned registrar did not accept his evidence that he E
thought that the father had signed as some sort of proxy for him. The husband,
I think, behaved very well in increasing his payments; indeed, he behaved well
at all times in the fixing of his payments. But what he did was to give more to
his wife because she had additional commitments. He knew that the new home
was intended to be the home of all of them, i.e., of his parents-in-law as well as of
his wife and of himself and of their daughter. It was not like the case where a F
husband and wife arrange for a home for themselves, and where they con-
template acquiring what might be regarded as a matrimonial asset. Never-
theless, everything here was going to enure for his benefit because there would be
the security for all of them of having a home.

Though the payments by way of naval allotment continued until 1956, there
was some friction in the later period and at the end of 1954 the husband wrote a G
letter which included the following passages:

"I trust I have made it perfectly clear that I have no intention of returning
home under the present arrangements. Quite frankly I am a little tired of
hearing what you and yours have done to put a 'roof over our heads'. The
house is, I understand, in your name so there should be no legal snags. H
You have always, with regard to the house, and most other mutual points,
shown complete independence by making decisions without consulting
me so you won't be put out unduly by my absence. It has become increas-
ingly obvious to me that my presence at home causes considerable unrest
and embarrassment to yourself and Gran, so this is the primary reason for
making my decision to pack up and clear out. I never want to experience
another leave such as this last one."

The decision in *Silver v. Silver* (1) has relevance in regard to this part of the I
case. In *Silver v. Silver* (1) the facts were ([1958] 1 All E.R. 523) that originally
a house

"was purchased in the name of a wife, whose parents provided £90 of the
purchase price in cash, the rest (£805) being borrowed on the security of
a mortgage granted to a building society. The husband joined as a party to
the mortgage deed as guarantor, and deposited with the building society a

A policy of insurance as security. The mortgage repayments were provided out of a sum of money which the husband paid each week to the wife for household and other expenses. In 1944 the house was sold for £1,700, and another house was bought in the wife's name for £2,000, of which £1,500 was borrowed on the security of a mortgage. In 1948 that house was sold for £4,500, and another house was bought. Again part of the proceeds of sale of the house sold was used in the purchase of the new house, the rest being borrowed on a mortgage. Later that house also was sold, and another purchased in the wife's name, part of the purchase money being raised by means of a mortgage. In the case of each house purchased, the mortgage arrangements were similar to those adopted in the purchase of the house bought in 1933, viz., the husband joined as guarantor and provided for the repayments of the money borrowed. Each house was successively the matrimonial home."

It was conceded by the wife that, if she was entitled to the house, her interest would be charged with the mortgage instalments falling due after the date when the parties separated which were paid by the husband as guarantor, he being subrogated to the mortgagee's rights. It was held that the wife was entitled to the house, subject always to the mortgage instalments falling due after the date of separation, because there was a presumption that the mortgage moneys repaid by the husband were gifts to the wife as the houses had been bought successively in the wife's name, and the decision of the learned county court judge that the presumption of advancement was not rebutted was not disturbed. In his judgment, LORD EVERSHED, M.R., said (*ibid.*, at p. 526):

E "On the face of it, it was plainly the wife's property. Over this long period the husband paid the mortgage interest and instalments, and the matter which the judge had to determine was, what was the proper inference from that long-continuing conduct? His conclusion, as I have said, was that in so far as he made these contributions he must be taken to have been advancing to the wife, since they were to the benefit of the equity of redemption, which belonged to the wife."

F PARKER, L.J., said (*ibid.*, at p. 528):

G "I think that in the case of a family asset such as the home or the furniture, acquired for the joint use of the spouses, the presumption of advancement can be easily rebutted. It is different from a case where what is acquired is, for instance, for the wife's personal use."

In the present case, however, it must always be remembered that the new house was really being bought for two families, the wife's father and mother, and the wife with her husband and daughter. There is further in the present case the fact that the wife's father and mother made contributions at the time that the house was bought. I have already stated that the exact measure of that contribution has not been precisely ascertained, but the wife said in her evidence: "I can only say in all sincerity that my father and mother did help me." There is also in the present case the circumstance that there was some help from the father in regard to money payable by way of mortgage instalments, although the measure of it was not ascertained. But the husband (as his original letter shows) certainly thought that there was to be a considerable contribution.

I In all the circumstances, it does not seem to me that the continuance of naval allotments, even at an increased rate after the house had been bought, had any other effect than making provision for the wife to enable her to discharge obligations which were hers. It is not suggested that the husband was placed in the position of having a charge on his wife's property. What is said is that in some way the husband became introduced into and joined in the beneficial ownership. He was, however, merely maintaining his wife with the knowledge that she, with her father, had acquired a home for them all, and that in consequence she had financial burdens.

In my judgment, therefore, the husband had no beneficial interest in the house when it was first bought and did not subsequently acquire any such interest. I would therefore dismiss the appeal. A

ORMEROD, L.J.: I am in full agreement with the views which have been expressed by MORRIS, L.J., and there is nothing that I wish to add.

HODSON, L.J.: I also agree that the appeal should be dismissed. B

Appeal dismissed.

Solicitors: *Trott & Gentry* (for the husband); *Warmingtons & Trevor Jones* (for the wife).

[Reported by F. A. AMIES, ESQ., Barrister-at-Law.] C

PRACTICE DIRECTION. D

RESTRICTIVE PRACTICES COURT.

Restrictive Trade Practices—Court—Practice—Restrictions—Statement of case should identify admitted restrictions and give particulars—Answer should identify any further alleged restrictions—Reply should give particulars of any such further restrictions admitted—Restrictive Practices Court Rules, 1957 (S.I. 1957 No. 603), r. 18—Restrictive Trade Practices Act, 1956 (4 & 5 Eliz. 2 c. 68), s. 20 (1). E

Under s. 20 (1) of the Restrictive Trade Practices Act, 1956, the court is empowered to declare whether or not any restrictions, as defined in the sub-section and contained in the agreement to which the notice of reference applies, are contrary to the public interest. In order that such a declaration may be made in precise terms, the statement of case delivered by the respondent should identify precisely all the terms in the agreement which are admitted to be restrictions within the meaning of s. 6 of the Act. The statement of case should set out in relation to each of the restrictions, taking them either separately or in a group as may be convenient, the particulars required under r. 18 of the Restrictive Practices Court Rules, 1957. If the registrar wishes to contend that there are other restrictions contained in the agreement, and which are not identified in the statement of case, he should in his answer identify such other restrictions. If the respondent admits the restrictions alleged in the answer, he should in his reply give the same particulars in relation to them as are required for those set out in the statement of case. F

Where pleadings which do not conform with this practice have already been filed, it will not be necessary to amend them; but the parties should identify in a separate document to be filed with the proper officer of the court seven days before the earliest date for which the hearing of the case is fixed, the restrictions which they admit or allege. G

By direction of the President. H

JOHN BOWYER,
Clerk of the Court.

A FAWCETT PROPERTIES, LTD. v. BUCKINGHAM
COUNTY COUNCIL.

[CHANCERY DIVISION (Roxburgh, J.), October 23, 24, 27, 28, 29, 1958.]

B *Town and Country Planning—Development—Permission for development—Condition—Permission to build cottages and condition limiting occupation of cottages to occupants employed in agriculture, etc.—Validity—Town and Country Planning Act, 1947 (10 & 11 Geo. 6 c. 51), s. 14 (1).*

C In pursuance of their powers under the Town and Country Planning Act, 1947, and the Town and Country Planning General Development Order, 1950, a local planning authority issued a document giving permission to the applicants to erect a pair of farm worker's cottages subject to the condition that the "occupation of the houses shall be limited to persons whose employment or latest employment is or was employment in agriculture as defined by s. 119 (1) of the Town and Country Planning Act, 1947, or in forestry, or in an industry mainly dependent upon agriculture and including also the dependants of such persons as aforesaid". The document further indicated that the reason for imposing that condition was that

D "the council would not be prepared to permit the erection of dwelling-houses on this site unconnected with the use of the adjoining land for agriculture or similar purposes". There was no development plan relating to the relevant area at the date of the permission, but the local authority envisaged its inclusion in a green belt area. On the question of the validity of the condition,

E **Held:** the condition was ultra vires and void because it did not fairly and reasonably relate to any local planning consideration (as was impliedly required by s. 14 (1) of the Act of 1947), since it meant, for example, that the landlord in choosing a tenant would be bound to give priority to a retired farm worker who had never before lived in England over a person working in a local industry not connected with agriculture.

F *Pyx Granite Co., Ltd. v. Ministry of Housing and Local Government* ([1958] 1 All E.R. 625) applied.

Per CURIAM: some condition for the general purpose of securing these cottages for agricultural workers so long as there were any who wished to inhabit them would have been a proper exercise of power under the Act (see p. 524, letter B, post).

G [For the Town and Country Planning Act, 1947, s. 14 (1), s. 18 (3), s. 36, and s. 119 (1), see 25 HALSBURY'S STATUTES (2nd Edn.) 511, 516, 544 and 635.]

Case referred to:

(1) *Pyx Granite Co., Ltd. v. Ministry of Housing and Local Government*, [1958] 1 All E.R. 625; [1958] 1 Q.B. 554; 122 J.P. 182.

H **Action.**

The plaintiffs were the present owners in fee simple of a pair of semi-detached cottages known as Penwyn Cottages (hereinafter referred to as "the cottages") situated off Dibden Hill Lane, Chalfont St. Giles in the county of Buckingham and on land situated in the metropolitan green belt. The defendants, Buckingham County Council, were the planning authority under the Town and Country Planning Act, 1947, for the area.

I Donald Decimus Clark was the plaintiffs' predecessor in title, and in response to an application under the Town and Country Planning Act, 1947, by him dated Nov. 22, 1952, the defendants through the clerk of the rural district council issued a document dated Dec. 5, 1952, whereby they, as local planning authority, gave permission for the erection of a pair of farm worker's cottages (viz., the cottages mentioned above) subject to the condition that

"The occupation of the houses shall be limited to persons whose employment or latest employment is or was employment in agriculture as defined

by s. 119 (1) of the Town and Country Planning Act, 1947, or in forestry, or in an industry mainly dependent upon agriculture and including also the dependants of such persons as aforesaid."

The reason for imposing the condition was stated to be

"Because the council would not be prepared to permit the erection of dwelling-houses on this site unconnected with the use of the adjoining land for agriculture or similar purposes."

At this date there was no development plan. The condition was registered as a local land charge in the register of town planning prohibitions or restrictions. The cottages were erected on the site and after erection were first occupied for a substantial period by persons whose employment was covered by the terms of the condition.

On Dec. 31, 1956, the fee simple in the cottages was conveyed to the plaintiffs. The plaintiffs were anxious to place in occupation of the cottages persons whose employment was not covered by the terms of the condition, but the defendants maintained that this would constitute a breach of the law relating to town and country planning and would render the plaintiffs liable to enforcement proceedings. The plaintiffs contended that the condition was ultra vires the power of the defendants and void, and sought a declaration to that effect.

R. E. Megarry, Q.C., and *C. F. Fletcher-Cooke, Q.C.*, for the plaintiffs.

J. P. Widgery, Q.C., and *Alan Fletcher* for the defendants, the Buckingham County Council, the planning authority.

ROXBURGH, J.: This case raises difficult and complicated questions under the Town and Country Planning Act, 1947, which I shall hereafter call "the Act". It has been necessary to canvass an even greater number of difficult and important questions which in the result I have managed to evade for the time being, but I could not have reached a decision at all without going into those matters and, accordingly, I must formally express my gratitude to counsel on both sides for the great assistance they have given me (and in fact I might fairly and seriously say the tuition they have given me) in this legislation. Though my judgment will be fairly short it does not mean that I have thought the questions easy of resolution.

On Dec. 5, 1952, in response to an application by the predecessor in title of the plaintiffs, the defendants, through the clerk of the Amersham Rural District Council, issued a document in pursuance of their powers under the Town and Country Planning Act, 1947, and the Town and Country Planning General Development Order, 1950 (S.I. 1950 No. 728). [His Lordship read the document dated Dec. 5, 1952, which is set out above, and continued:] Section 36 of the Act provides:

"Where, under the foregoing provisions of this Part of this Act, a local planning authority are required to have regard to the provisions of the development plan in relation to the exercise of any of their functions, then, in relation to the exercise of those functions during any period before such a plan has become operative with respect to the area of that authority, that authority shall have regard to any directions which may be given to them by the Minister as to the provisions to be included in such a plan, and subject to any such directions shall have regard to the provisions which in their opinion will be required to be so included for securing the proper planning of the said area."

At the material date, Dec. 5, 1952, there was no such plan and as far as I am aware the Minister had given no direction and accordingly they had to

"have regard to the provisions which in their opinion will be required to be so included [in the plan] for securing the proper planning of the said area."

A I draw attention to those words in passing "securing the proper planning of the said area", because, although they may not be directly relevant, they are entirely consistent with the view which I have of the scope of the powers of a local planning authority.

Their powers in regard to the matter of granting permission are to be found mainly, if not exclusively, in s. 14. I do not find it necessary to discuss the ambit of s. 18 (3) which provides:

"Where permission is granted under this Part of this Act for the erection of a building, the grant of permission may specify the purposes for which the building may be used; and if no purpose is so specified, the permission shall be construed as including permission to use the building for the purpose for which it is designed."

C It is unnecessary, and it would be dangerous for me, in view of the serious problems involved, to discuss the meaning of that sub-section, because on the view that I take of the true construction of the Act this condition would be void, for reasons which I shall give, whether the condition purports to have been made under s. 18 (under which I do not think that it was ever intended to be made) or whether it was made under s. 14, which seems to me (and in this respect I cannot accept the whole of the argument of counsel for the plaintiffs) to enable a proper condition to be imposed to achieve the purpose which I have no doubt that the defendants had in mind. I say at once, however, in order to avoid any danger of misunderstanding, that there is no suggestion whatever of bad faith in this case.

E Section 14 provides:

"(1) Subject to the provisions of this and the next following section, where application is made to the local planning authority for permission to develop land, that authority may grant permission either unconditionally or subject to such conditions as they think fit, or may refuse permission; and in dealing with any such application the local planning authority shall have regard to the provisions of the development plan, so far as material thereto, and to any other material considerations.

F "(2) Without prejudice to the generality of the foregoing sub-section, conditions may be imposed on the grant of permission to develop land thereunder ..."

Then follow two categories, (a) and (b). Section 36 provides for a case in which no development plan has become operative.

G That there is some limitation on the words "such conditions as they think fit" is plain on authority binding on me. I am not prepared, however, to accept the limitation which counsel for the plaintiffs sought to place on the local planning authority. He submitted that they were entitled to make it a condition that the permitted development, which was a dwelling-house, should be used for residential or industrial or other general purposes. He said, to use his exact phrase, that it was possible for them to impose a condition that the building that was being permitted should be used as a dwelling-house or as an industrial establishment or similar class of definition, but that it was not permissible to prescribe categories of persons by whom alone the building could be used as a dwelling-house. It is contrary to my instinct to write glosses into an Act of Parliament unless either that has been done by authority already binding on me, or there is a context to be found in the Act when read as a whole which makes it logically impossible to believe that Parliament intended the language used by it to be applied with all the generalities which it appears to possess. If the language which Parliament has used is clear and if there is no context to control it, then in my view, if it leads to unexpected consequences, Parliament is the body to reform the provision and not any of us. I do not find anywhere in the Act anything which to me seems a sufficient reason for reframing the language of Parliament in the manner suggested by counsel.

That is by no means the end of the case. Although there was no development plan at the material date, I am quite prepared to believe that the defendants when minded to consider what provisions would be required to be included in the development plan for securing the proper planning of the said area were entitled to envisage that the site in question might, when there was a development plan in due course, be found to be included in a green belt area, using that term more popularly than legally. I think that the defendants had an intention to preserve this site as a rural area, and that it was bona fide and in fact a proper performance of their duties. That being so, I think that some condition, designed to keep these cottages available for agricultural workers so long as they were required for the housing of agricultural workers, would have been entirely consistent with proper planning and I do not say that such a condition may not extend further than I have just mentioned. That may be to some extent an obiter dictum, but I think that it was necessary for me to say it in order to explain how I reach my conclusion to which I shall come. All that I have said is that some condition for the general purpose of securing these cottages for agricultural workers, so long as there were any who wished to inhabit the cottages, would, in my opinion have been a proper exercise of power under this Act. I do not say, on the other hand, that the restriction could have been as narrow as the reason given in the document of Dec. 5, 1952, which I have read, because no attempt to impose such a condition was made. The reason has to be stated, but what the exact effect of stating the reason is has not been decided and need not now be decided.

It seems to me that whereas the words in s. 14 (1) of the Act are "subject to such conditions as they think fit", they must be such conditions as they think fit having regard to the statutory duties with which they are entrusted. I think that limitation must apply to all persons whose rights and duties are the creation of the statute. What they are entrusted with is local planning and it is not for no purpose that in the very section which I have to construe they are called the local planning authority. Again, not without significance, in s. 36, though it does not directly apply, there is a reference to the "proper planning of the said area" and there are indeed many other similar phrases which I might pray in aid scattered about the Act. I am prepared to place one gloss on this statute because it is hallowed by authority and that is that however general the words "such conditions as they think fit" may be, they must be such conditions as they think fit having regard to local planning considerations. It seems to me that that is inevitably so, and I might add that in my view when the section refers to "any other material considerations" it means any other consideration material to the development in connexion with local planning. Therefore I consider that the question which I have to solve is whether this condition can possibly be one which could have been imposed solely with regard to local planning considerations.

There is an authority which binds me to say that. It is the authority of the Court of Appeal in *Pyx Granite Co., Ltd. v. Ministry of Housing and Local Government* (1) ([1958] 1 All E.R. 625). LORD DENNING, after referring to the condition there in question, which I may say bore no resemblance to the condition in the present case, says (*ibid.*, at p. 633):

"The Minister claims to impose these conditions under the general power contained in s. 14 (1), or alternatively under the special power contained in s. 14 (2) (a)."

There was some point in referring to s. 14 (2) (a) in that case, because it does look very much like one of the cases specifically referred to in s. 14 (2) (a), but as s. 14 (2) (a) is without prejudice to the generality of s. 14 (1), I prefer to deal only with s. 14 (1), which I think is more likely to cover the present case than s. 14 (2) (a); though it makes no difference which it is in my view. LORD DENNING continues (*ibid.*):

"The principles to be applied are not, I think, in doubt. Although the planning authorities are given very wide powers to impose 'such conditions

- A as they think fit' [a reference to s. 14 (1)], nevertheless the law says that those conditions [the conditions which they seek to impose under s. 14 (1)], to be valid, must fairly and reasonably relate to the permitted development. The planning authority are not at liberty to use their powers for an ulterior object, however desirable that object may seem to them to be in the public interest."
- B As LORD DENNING in effect points out in the next sentence, the word "ulterior" is not to bear any sinister meaning and that is the reason why I prefer the Chancery phrase, drawn from company law, "collateral purpose": there is no suggestion of naughtiness in "collateral". That passage in LORD DENNING's judgment is binding on me. It was approved by HODSON, L.J., and tentatively approved by MORRIS, L.J.; I say "tentatively" because in his view that matter
- C did not really arise.
- In the event, I have been absolved from the obligation of deciding what will be the consequence of the judgment which I am in process of delivering and the only person, so far as I know, who has embarked on that problem is HODSON, L.J. He has used some very far-reaching language in *Pye Granite Co., Ltd. v. Ministry of Housing and Local Government* (1). He says ([1958] 1 All E.R. at p. 637):
- D "In any event it would, I think, be impossible to mutilate the Minister's decision by removing one or more of the conditions. The permission given has been given subject to those conditions, and non constat but that no permission would have been given at all if the conditions had not been attached. The consequence would be that if any of the conditions imposed were held to be bad as imposed without jurisdiction, the whole planning
- E permission would fall with it, and the company would be left without any planning permission at all, for it would not be open to the court to leave the planning permission standing shorn of its conditions, or any of them."
- So that if there were twenty varied conditions attached to the permission to erect the house, and the house had been erected and yet one of them, however
- F trivial, was ultra vires, there would be no planning permission for the erection of that house. That is a very far-reaching obiter dictum and I am glad that I have been absolved from the duty of considering whether it is well founded.
- Counsel for the plaintiffs has submitted that many of the elements of this condition are void for uncertainty. With some difficulty I persuaded him that it did not matter whether they were void for uncertainty until some other court was
- G prepared to decide that they were intra vires; but I owe it to his able argument, which did in fact raise a prima facie case of uncertainty in connexion with one of them, to say that he argued it very fully and it is a point open to him if some other court should think that this condition is intra vires. The phrase that gives me most worry in that connexion is "an industry mainly dependent upon agriculture".
- H There are some things which seem to be so irrelevant to town planning that they should be so regarded unless somebody is prepared to give some reason, whether that reason be given by the representative of the town planning authority or arguendo by counsel. In spite of the extremely able argument put before me by counsel for the defendants, he was unable to give any reason for some of these restrictions. His broad proposition about them was that if there was a town and
- I country planning element in it I should disregard the things that had no town and country planning elements. I can believe some such argument could be acceptable if the irrelevant matter bore small proportion to the relevant matter, but where the irrelevant matter is pari passu with or in excess of the relevant matter, that is an argument which does not appeal to me. It would be difficult to upset a properly framed condition giving priority in respect of the occupation of these houses to the agricultural workers in this district. That is the first time I have mentioned the phrase "in this district", but it might have been implied except for the words which I shall mention, because

it would be difficult for an agricultural worker to live in this house and work in some other district; but owing to the wide extent of this clause that ceases to be true. It covers as the primary category of potential occupants persons whose employment is or was agricultural. That would cover agricultural workers, whether their work was in the district, in the British Empire, in the British Commonwealth or anywhere in the world, who had altogether retired from employment. That is the leading category and I am quite unable to see, and nobody has suggested, how any local planning purpose could be served by giving priority to persons who were in retirement and who perhaps had never been in the district in their lives before. Counsel for the defendants developed an argument on these lines. The avowed purpose of the defendants, as stated in the reasons, might be too narrow. I do not say that it is, but I see that it might be, and therefore, he says any extension in the interest of the landowner cannot be ultra vires. After all, he need not take advantage of it. We might have tied him up, so the argument goes, much more stringently; but that will not do, in my judgment. Persons entrusted with a statutory duty have to perform their duty in a manner which is fair, not only to the landlord but to all other classes in the community who may be concerned. A B C

The effect of this limitation is that supposing that there were two applicants for this cottage, one of whom was working in Chalfont St. Giles in an industry which did not fall within the range of the permitted industries and the other a retired farm worker who had never been in England before, apparently the landlord would be bound to choose the retired farm worker who had never been in England before. That in my judgment is grossly unfair to the non-agricultural resident in Chalfont St. Giles and is an unfairness which no town and country planning official could possibly justify and nobody sought to do so. The matter does not end there. D E

There is a second major category, "the dependants of such persons as aforesaid". It was argued that "dependants" is void for uncertainty. I do not think as at present advised that that phrase is void for uncertainty, though it is extremely ambiguous and one that it is not fair to put into a condition of this sort; but however I construe it, what possible town and country planning purpose could be alleged for giving priority to dependants of persons engaged in agriculture unless there was somebody also residing in the house who was in fact engaged in agriculture or unless (and this might be a perfectly fair limitation) the dependant were the widow of a man who had been engaged in agricultural work while living in the house. That might be a fair limitation. I do not decide whether it is or not, but one can see the town and country planning purpose behind a restriction of that sort. This condition, however, is not limited, as far as I can see, in that way at all. Anybody who can say he was depending on such persons as aforesaid would take precedence as a new tenant over anybody who could not allege that he came within the category. I can see no town and country planning purpose in that and it also seems to me that it is very unfair on persons now residing in Chalfont St. Giles who are not engaged in any of the permitted occupations. F G H

Thirdly, even if the phrase "an industry mainly dependent on agriculture" is not void for uncertainty, I should have thought that it was a wholly unreasonable clause to put into a condition of this sort which, it is to be observed, is in relation to farm workers' cottages. If it is capable of construction, the research necessary to ascertain who was qualified would be expensive and extensive. I do not know what it means; it might mean all sorts of different things; but if it can be construed (and for this comment I am assuming, without deciding, that it can be construed) the first thing would be to get it construed and the next thing would be a very expensive and extensive inquiry as to what industries fell within the condition as so construed. To put a thing like that into a permission for the erection of farm workers' cottages, if it does relate to town planning, would be grossly unfair. Moreover I am not able to see how any town planning purpose I

A can be as wide as that. I suppose nobody would deny that, for instance, the extraction of sugar from beet was an industry mainly dependent on agriculture. Whatever the words may mean, that is not a borderline case. I cannot see what possible town planning purpose there could be in giving priority, in a proposed green belt area, to persons engaged in the beet sugar industry. Whether that phrase is void for uncertainty or not, it is almost impossible to imagine any town planning purpose to which it is to be related, and if it can be so related it is, in my judgment, grossly unfair to expect the landlord and his potential tenants of this cottage to trouble over a problem of that complexity and magnitude.

I have arrived, therefore, at the conclusion that this clause is ultra vires as not fairly and reasonably relating to any local planning considerations. I observe that I am using words slightly different from those used by LORD DENNING in *Pyx Granite Co., Ltd. v. Ministry of Housing and Local Government* (1) ([1958] 1 All E.R. at p. 633). I have intended to put it in that way because the point which arises in this case is not quite the same and he might have put it slightly differently if he had been dealing with this particular case, but I do not think that there is any real difference between what he said and what I am now saying.

D I have already said that I entirely absolve the council from any ulterior object in the sense of improper object and I am not in a position to say whether in truth this was inserted for some collateral purpose or whether it is a case of a blunder. If it is not for some planning purpose it does not matter whether it is for some collateral purpose or simply because of a blunder. I am disposed to think that "blunder" is the true explanation and I say that because of the complete difficulty of reconciling the reason with the clause. It may be that the reason given was too narrow to be justified in a clause; but any competent draftsman could have thought of a hundred variations of that reason which would have been very difficult to attack. If it is a blunder it cannot be something which was really done in exercise of statutory powers. LORD DENNING said in *Pyx Granite Co., Ltd. v. Ministry of Housing and Local Government* (1) ([1958] 1 All E.R. at p. 633):

"If they mistake or misuse their powers, however bona fide, the court can interfere by declaration and injunction."

This is a blunder or a mistake where, in my judgment, I ought to make a declaration that the condition is and was ultra vires and of no effect. I order the rectification of the local land charge by deleting the entry which was made on Dec. 5, 1952.

Judgment for the plaintiffs.

Solicitors: *A. L. Philips & Co.* (for the plaintiffs); *Sharpe, Pritchard & Co.*, agents for *Solicitor and Clerk to Buckingham County Council* (for the defendants).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

LILLEY v. LILLEY.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P., and Hewson, J.), October 6, 7, 8, 9, 10, 29, 1958.]

Magistrates—Husband and wife—Maintenance—Wilful neglect to maintain—No matrimonial misconduct by husband—Wife suffering from neurosis—Wife incapable of resuming cohabitation—No liability on husband—Liability of husband under National Assistance Act, 1948 (11 & 12 Geo. 6 c. 29), s. 42, s. 43—Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 Vict. c. 39), s. 4.

Divorce—Desertion—Intention—Capability of respondent spouse to have animus deserendi—Wife suffering from neurosis—Wife incapable of returning to husband.

The parties were married in 1948 and in 1952 a child was born. The birth of the child caused a gravely aggravated mental or nervous disorder in the wife which developed into an invincible repugnance to sexual intercourse with the husband. The parties separated, and on Oct. 12, 1954, a magistrates' court found the husband guilty of desertion and made a maintenance order in the wife's favour under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949. Thereafter the husband wrote to the wife letters which were found to contain a genuine offer to resume cohabitation which the wife refused to accept and on Aug. 23, 1957, the magistrates' court discharged the order. The husband continued to pay maintenance voluntarily for a short while but then ceased to do so and the wife made a complaint to the same magistrates' court alleging that the husband had wilfully neglected to provide reasonable maintenance for her. Medical evidence showed that the wife suffered from a neurosis which produced an acute revulsion to any physical contact with the husband and that if she returned to him there would be a serious breakdown in her health. The wife did not allege that the husband was guilty of any matrimonial misconduct but contended that the husband was liable to maintain her at common law and that his deliberate refusal to do so amounted to wilful neglect. The husband contended that he was under no liability to maintain the wife since (i) he was guilty of no matrimonial misconduct and (ii) she was in desertion.

Held: the wife was not entitled to maintenance since, although she was not in desertion as she was incapable of resuming cohabitation (*Keeley v. Keeley*, [1952] 2 T.L.R. 756), her justification for refusing to cohabit with the husband involved no matter of complaint against him, and therefore there was no element of misconduct on his part to support a charge of wilful neglect to provide reasonable maintenance.

Pinnick v. Pinnick ([1957] 1 All E.R. 873) followed.

Per CURIAM: where a wife is not in desertion, and there is no question of adultery, the National Assistance Board has an independent right against the husband under s. 42 and s. 43 of the National Assistance Act, 1948 [to recover from the husband contributions towards the cost of public assistance to the wife]; an order under s. 43 (5) (b) for the husband to maintain his wife could be made by virtue of the express liability of the husband to maintain the wife under s. 42 and would not necessarily impute a finding of wilful neglect (see p. 534, letter A, post).

Appeal dismissed.

[**Editorial Note.** Where an order is made against a husband under s. 43 of the National Assistance Act, 1948, and payments under that order are punctually made to the wife, it seems that the fact of punctual payments being made is not conclusive against an allegation of wilful neglect to provide reasonable maintenance, though a complaint alleging such neglect will not succeed unless an element of misconduct is shown: see *Jones v. Jones*, p. 410, ante.

A As to the liability of a husband on ground of wilful neglect to maintain, see 12 HALSBURY'S LAWS (3rd Edn.) 482, para. 1077, text and note (h); and for cases on the subject, see 27 DIGEST (Repl.) 701, 6707 and Supplement; and as to capability of respondent spouse to have animus deserendi, see 12 HALSBURY'S LAWS (3rd Edn.) 245, para. 457, text and note (b); and for cases on the subject, see 27 DIGEST (Repl.) 346, 2876 and Supplement.

B As to obligation of husband to maintain wife at common law, see 19 HALSBURY'S LAWS (3rd Edn.) 817, para. 1337; and for cases on the subject, see 27 DIGEST (Repl.) 80-82, 613-630.

For the National Assistance Act, 1948, s. 42, s. 43, see 16 HALSBURY'S STATUTES (2nd Edn.) 968-970.

C For the Summary Jurisdiction (Married Women) Act, 1895, s. 4, see 11 HALSBURY'S STATUTES (2nd Edn.) 849.]

Cases referred to:

- (1) *Keeley v. Keeley*, [1952] 2 T.L.R. 756; 3rd Digest Supp.
- (2) *Jones v. Newtown & Llanidloes Guardians*, [1920] 3 K.B. 381; 89 L.J.K.B. 1161; 124 L.T. 23; 84 J.P. 237; 27 Digest (Repl.) 82, 627.
- (3) *Tulip v. Tulip*, [1951] 2 All E.R. 91; [1951] P. 378; 27 Digest (Repl.) 85, 635.
- (4) *National Assistance Board v. Parkes*, [1955] 1 All E.R. 700; [1955] 1 Q.B. 486; *affd.* C.A., [1955] 3 All E.R. 1; [1955] 2 Q.B. 507; 3rd Digest Supp.
- (5) *Crowther v. Crowther*, [1951] 1 All E.R. 1131; [1951] A.C. 723; 27 Digest (Repl.) 359, 2974.
- E** (6) *Pinnick v. Pinnick*, [1957] 1 All E.R. 873; 121 J.P. 256; 3rd Digest Supp.
- (7) *Baker v. Baker*, (1949), 66 (pt. 1) T.L.R. 81; 27 Digest (Repl.) 82, 630.
- (8) *Price v. Price*, [1951] 2 All E.R. 580, n.; [1951] P. 413; 115 J.P. 468, n.; 27 Digest (Repl.) 85, 636.
- (9) *Stringer v. Stringer*, [1952] 1 All E.R. 373; [1952] P. 171; 116 J.P. 102; 3rd Digest Supp.
- F** (10) *Starkie v. Starkie* (No. 2), [1953] 2 All E.R. 1519; 118 J.P. 59; 3rd Digest Supp.
- (11) *Chapman v. Chapman*, (Apr. 7, 1951). Unreported.
- (12) *National Assistance Board v. Wilkinson*, [1952] 2 All E.R. 255; [1952] 2 Q.B. 648; 116 J.P. 428; 3rd Digest Supp.

Appeal.

G This was an appeal by the wife against an order of the stipendiary magistrate for Kingston-upon-Hull dated Feb. 26, 1958, whereby he dismissed the wife's complaint that the husband had been guilty of wilful neglect to provide reasonable maintenance for her. The facts appear in the judgment of LORD MERRIMAN, P.

H *R. H. Hutchinson* for the wife.
K. M. McHale for the husband.

Cur. adv. vult.

I Oct. 29. LORD MERRIMAN, P., read the following judgment: The order of Feb. 26, 1958, was on the third of three complaints between the spouses, all of which were heard by the learned magistrate. On Oct. 12, 1954, an order for £3 a week (viz., £2 for the wife and £1 for the child of whom she was given custody) had been made on her complaint of desertion. On Aug. 23, 1957, that order was discharged on the husband's complaint, but at the same time the learned magistrate made an order under the Guardianship of Infants Acts, giving the wife the custody of the child and ordering the husband to pay 30s. a week for the child's maintenance. Nevertheless, for a short time thereafter the husband continued to pay the total sum of £3. On Sept. 6, 1957, he ceased paying anything except the 30s. under the Guardianship of Infants Order, and on Oct. 21, 1957, in the course of correspondence which we have seen between the respective

solicitors, the husband's solicitor wrote to say that the husband proposed to discontinue the voluntary allowance. Thereupon, on Jan. 4, 1958, the wife made her complaint of wilful neglect to maintain, the dismissal of which is the subject of the present appeal. The learned magistrate having dealt with the case at every stage, we have had the advantage of seeing the considered statements of his reasons, not only on the present complaint, but on the other two cases as well. It is only just to him to pay tribute to the great care that he has manifestly taken at every stage of what is by no means an easy case.

The material facts are as follows. The parties were married on Oct. 2, 1948. It is evident from one of the magistrate's findings that the marriage went reasonably smoothly until the birth of the child on Mar. 13, 1952. It appears, however, that the husband was always more interested in the sexual side of life than the wife was. The wife's confinement was very difficult. The magistrate found that thereafter the wife suffered from some mental or nervous disorder which was either caused or gravely aggravated by the birth of the child. She suffered from periods of acute depression which got progressively worse, and she developed an invincible repugnance to sexual intercourse which, although he had heard no medical evidence at the first hearing, the magistrate described as being

"as real and as overwhelming as a physical disability which made sexual intercourse impossible"

and said that this state of things was in no way attributable to wilfulness on her part. It is right to say that those conclusions, formed, as I have said, without the assistance of medical evidence, were amply confirmed in the two subsequent cases by the evidence of a Dr. Hendy, whose evidence the magistrate unreservedly

Dr. Hendy said amongst other things that the neurosis produced an acute revulsion to sex relations, over which he believed her to have no control; that if she were to return to live with her husband he feared that the result would be disastrous. Asked by the magistrate to say exactly what he meant, he said she might go over the border into insanity, or over the border into physical disability. The effects would be comparable in any case: that there would be a serious breakdown in her health so as to make her incapable of living a normal life. The doctor did not think that living with her husband on condition that there was no sexual intercourse was a reasonable condition for either of them. He thought that the fact that the wife could not bear to be near to her husband was largely due to the sex phobia, a manifestation of the neurosis, but that it extended to proximity to men generally, and added that the very fact that a man was near her would set her in a state of anxiety. The doctor gave as one recent example of this an occasion when the wife met her husband accidentally. Questioned by the magistrate about a sexless return to cohabitation, the doctor accepted that he meant that even so a reaction might occur when the wife heard the husband's voice or if he were to touch her. He made it clear that this was apart from actual sexual acts, and that he was speaking of the mere fact of having to return and live under a communal roof; repeating that he feared that it would be disastrous to her mental health to return to her husband at all. He said that there was nothing wilful about this state of things at all; that it was an illness.

Cross-examined, he said that he accepted that the wife was rational and in normal mental health "except so far as it related to her husband"—and to other men. It seems to me that the exception goes to the root of the matter, and I will return to this later. The doctor did not think that there was any great difference in her condition as between Aug. 8, 1957, and the day on which he was then giving evidence. He also said in cross-examination that it was his firm belief that it was not possible for her to join her husband in his house on any terms whatever. Finally, in answer to the stipendiary magistrate, he made it quite clear that he was satisfied that the wife could not be said to be "playing-up", and

A that he thought that he would have spotted the symptoms if she had been doing so; that she was probably all right living a quiet life apart from her husband, but was "just managing on very thin ice", and that the possibility of a relapse could not be ruled out.

It is common ground that sexual intercourse had never taken place since some date in February, 1952, that is to say, before the birth of the child. On Oct. 2, 1952, the wife's condition was such that she was admitted as a voluntary patient to the Delapole Hospital at Hull, which is, as I understand, the mental hospital for that district. Dr. Hendy was at all material times the assistant psychiatrist at that hospital, and had the wife under his care while she was there. On Aug. 18, 1953, on her written request sponsored by the husband, she was allowed to return home. It is evident that this period of leave was not a success, as the wife is said to have suffered from attacks of dizziness described as black-outs, and she returned to the hospital on Sept. 15, 1953, where, subject to short absences, she remained continuously until June, 1956, when she went to live with her mother and the child. Thereafter she has visited the hospital regularly as an out-patient and has been seen by Dr. Hendy about every two or three weeks. [HIS LORDSHIP stated that between April and the end of June, 1954, the wife went home for week-ends, in an attempt to get herself rehabilitated and the parties occupied separate bedrooms. HIS LORDSHIP then read a letter dated Aug. 2, 1954, written by the husband to the wife with the intention of stopping her from returning to the matrimonial home and on which the magistrate at the hearing on Oct. 12, 1954, found the husband guilty of desertion. HIS LORDSHIP then referred to a letter from the wife dated Sept. 8, 1955, in which the wife said that there was no chance of a reconciliation; to two letters dated July 21, and Aug. 1, 1956, written by the husband to the wife after she had left hospital in which the husband, on the erroneous assumption that the wife was fully recovered, suggested a reconciliation; and to a further letter by the husband dated Apr. 1, 1957, to which the wife replied on Apr. 3, 1957, stating that from a medical point of view it was impossible for her to return to live with him. HIS LORDSHIP then referred to the husband's letter dated Apr. 17, 1957, in which he twice expressed regret for his letter of Aug. 2, 1954, and suggested that if she returned they could occupy separate bedrooms as in 1954. HIS LORDSHIP then referred to the discharge by the magistrate of the order of Oct. 12, 1954, on the ground that the husband had offered to resume cohabitation and the wife had refused and continued:] Not only was there no appeal against the magistrate's decision on Aug. 23, 1957, to discharge the order of Oct. 12, 1954, but the trial of the wife's present complaint was conducted below, and on this appeal, on the basis of an unqualified admission that the magistrate's decision of that case was unexceptionable. Accordingly, the wife's complaint, on the cessation of any maintenance for her after Sept. 6, 1957, of wilful neglect to provide reasonable maintenance must be dealt with on the footing that it is accepted that the husband had put an end to the state of desertion created by his letter of Aug. 2, 1954. Further, it was naturally conceded that if the husband, by the discharge of the order of Aug. 23, 1957, had ceased to be a deserter, and the wife's persistent refusal to resume cohabitation created a situation in which she herself became the deserter, there would be an end of her case. Conceding that the husband had ceased to be a deserter, the wife's case is that she has been and still is prevented by the state of neurosis from which she suffers in relation to life with her husband, and that this is a grave and weighty reason justifying her in not resuming cohabitation, even though it does not emanate from any misconduct on the part of the husband; that if she is not a deserter (there being no question of adultery) the husband is liable to maintain her by the common law of England, and therefore his deliberate refusal to do so amounts to wilful neglect.

It must be recognised, I think, that the stipendiary magistrate has actually held the wife to be "in desertion". In the last part of his judgment the learned magistrate said that he considered that the second and third points made by

the husband's solicitor must prevail. These points were: (second) that the husband had no legal liability to maintain his wife because he was not guilty of any matrimonial misconduct, and (third) that the wife is herself now in desertion, and therefore not entitled to the order sought at all. He added that these points are not necessarily corollaries, and that even though it be assumed that the wife was not in desertion, the husband had not, in his view, wilfully neglected to maintain her. I do not think, particularly having regard to other observations, that the finding of desertion by the wife is really qualified by the final observations. If so there is no more to be said, so long as that state of things continues. But I doubt whether it is right to hold that the wife is a deserter. A

The stipendiary magistrate stated that he assumes, on the part of the wife, a physical capacity to resume cohabitation and a mental capacity to make a rational decision and to form an intention to desert. Having regard, however, to the medical evidence already mentioned, the antithesis between physical and mental capacity seems to me to be of doubtful validity. The wife's assumed capacity to make a rational decision is based on Dr. Hendy's answer to the question already quoted, which itself contains the words "except so far as it relates to her husband", in assenting to which Dr. Hendy said "and to other men". In the course of the argument we intimated that we were not convinced that a woman suffering from an illness causing the reaction to the mere presence of her husband, or anyone of the male sex, as described by Dr. Hendy, without any question of wilfulness about it, could properly be assumed to be capable of making a rational decision to return to cohabitation or to desert. I am still of that opinion. I think that the stipendiary magistrate was wrong in rejecting the guidance of the Court of Appeal in *Keeley v. Keeley* (1) ([1952] 2 T.L.R. 756), on the grounds that the wife is no longer in hospital. In my opinion the undisputed medical evidence establishes that, although no longer in hospital, she was just as incapable of resuming cohabitation, whether one describes the incapacity as physical or mental, as the wife in *Keeley v. Keeley* (1), would have been held to be if the issue had been properly raised. For these reasons I do not agree with the stipendiary magistrate that all the elements necessary to constitute desertion were present. B

What, then, is the result? Counsel for the wife, in final analysis, founded the wife's case on *Keeley v. Keeley* (1), and in particular the passage in SINGLETON, L.J.'s judgment, where he says ([1952] 2 T.L.R. at p. 761): C

"If the respondent is stricken by illness which compels him or her to be in hospital for the relevant period, it is difficult to see that the petitioner can prove desertion without cause; and it seems to me that this reasoning would apply equally in the case of mental illness as it would in the case of (say) prolonged heart disease. In either case it should be pleaded and argued." D

He also relied on the statement of the common law in *Jones v. Newtown & Llanidloes Guardians* (2) ([1920] 3 K.B. 381) per EARL OF READING, C.J. (*ibid.*, at pp. 383-385), and per SHEARMAN, J. (*ibid.*, at pp. 385, 386), *Tulip v. Tulip* (3) ([1951] 2 All E.R. 91); and *National Assistance Board v. Parkes* (4) ([1955] 3 All E.R. 1) in the Court of Appeal; and particularly on the judgment of DENNING, L.J. (*ibid.*, at p. 4). In a very forcible argument, therefore, he submitted that the wife not being in desertion, though living apart, and there being no question of adultery, the husband is liable to maintain her at common law, and that he has not done so since he deliberately stopped what was described as the voluntary allowance of 30s.; and therefore he is guilty of wilful neglect to provide reasonable maintenance within s. 4 of the Summary Jurisdiction (Married Women) Act, 1895. E

As to *Jones v. Newtown & Llanidloes Guardians* (2), it is to be observed that the decision was that the guardians could recover from the husband the cost of the wife's keep incurred by them, thus being in line with the National Assistance Board cases to which I will refer; and to do so on the ground that the wife, a F

A deserter of long standing, had ceased to be so on becoming a pauper lunatic chargeable to the guardians. It is right to point out, without detracting at all from the validity of the exposition of the common law, which has frequently been followed with approval, that the last ground of the decision did not receive unqualified approval in the House of Lords in *Crowther v. Crowther* (5) ([1951] 1 All E.R. 1131 at p. 1134).

B As to *National Assistance Board v. Parkes* (4) and the judgment of DENNING, L.J., in the Court of Appeal, COLLINGWOOD, J., and I, sitting in this court, reviewed the whole question in *Pinnick v. Pinnick* (6) ([1957] 1 All E.R. 873). I consider that I am bound by that judgment. Even if I am not so, I adhere to it, not less so because it attracted favourable comment in 73 L.Q.R. 453-455. I do not propose to repeat our reasons now. Suffice it to say that we pointed out that in the

C Divisional Court in *National Assistance Board v. Parkes* (4), LORD GODDARD, C.J. ([1955] 1 All E.R. 700 at pp. 705, 707), having explained the practical meaning of a husband's liability at common law, recognised the validity of *Baker v. Baker* (7) ((1949), 66 (pt. 1) T.L.R. 81), and the cases in which it has been followed, and pointed out the distinction between decisions under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, and claims brought by the

D National Assistance Board under s. 42 and s. 43 of the National Assistance Act, 1948; we also doubted whether a case of the latter class was the appropriate occasion for overruling what appeared to be settled law in the former class, especially as judgments of the Court of Appeal were involved; and whether reasoning based on a minority view expressed by DENNING, L.J., in *Price v. Price* (8) ([1951] P. 413 at pp. 418, 419) was sound. We also expressed the

E opinion that there was no necessary conflict between *Tulip v. Tulip* (3) and *Baker v. Baker* (7) and similar cases down to *Price v. Price* (8) ([1951] P. at p. 421), in effect because the latter group dealt with the question of the entitlement of a separated wife to maintenance, whereas *Tulip v. Tulip* (3) dealt with the reasonableness of the amount in the case of an agreed separation.

F In this case there was plainly no agreement, either that the wife should live apart or that she should be maintained as a separated wife. The husband is admitted not to be in desertion, and I am assuming that the wife also is not so. The wife only attempts to justify her refusal to cohabit on a ground which involves "no matter of complaint against her husband" (see 12 HALSBURY'S LAWS (3rd Edn.) 482, para. 1077). In my opinion we should not be justified in abandoning the principles laid down by this court in *Baker v. Baker* (7), *Stringer v. Stringer* (9) ([1952] 1 All E.R. 373), *Starkie v. Starkie* (No. 2) (10) ([1953] 2 All

G E.R. 1519) and other cases, or by the Court of Appeal in *Chapman v. Chapman* (11) ((Apr. 7, 1951) unreported), and by the majority of the Court of Appeal in *Price v. Price* (8), in which case HODSON, L.J., said ([1951] P. at p. 421):

H "The question of [the wife's] right to maintenance may depend on whether she is a deserter or whether she is deserted or whether there is a contract between them. I do not think that the law recognises a sort of undefined condition where parties are living apart in conditions which may be described as of drift, or in some not very clearly defined condition in so far as rights to maintenance are concerned."

I Nor do I think that we ought to ignore the line of decisions in this court that wilful neglect to provide reasonable maintenance involves an element of misconduct—and to do both on the strength of a dictum* that the wife is entitled to maintenance because she is a wife, and that *Baker v. Baker* (7) and the other cases I have mentioned are over-ridden.

National Assistance Board v. Wilkinson (12) ([1952] 2 All E.R. 255), and *National Assistance Board v. Parkes* (4), decide that if the wife is a deserter the husband cannot be made to contribute to any public assistance given to the wife, but that if she is not in desertion, and there is no question of adultery, the

* Per DENNING, L.J., [1955] 3 All E.R. at p. 4.

National Assistance Board has an independent right against the husband under s. 42 and s. 43 of the National Assistance Act, 1948. It is true that under s. 43 (5) (b) the National Assistance Board can obtain an order to pay the money to the wife, but this, I emphasise, is an order made by virtue of the express liability of the husband to maintain his wife under s. 42 and does not necessarily impute a finding of wilful neglect. In my opinion that is the true solution of this difficult case. But I do not think that in the circumstances the husband can be found guilty of wilful neglect to provide reasonable maintenance. I therefore agree with the learned stipendiary magistrate's conclusion, although I differ from some of his reasons. Accordingly the appeal will be dismissed.

HEWSON, J.: I agree with LORD MERRIMAN, P., and would add that in my view the learned stipendiary magistrate was right in holding, on Aug. 23, 1957, that the husband was no longer in desertion of his wife. I cannot accept, however, that the wife became a deserter through her refusal to return under the matrimonial roof. She, through her acute state of neurosis, over which she had no control, was quite unable to return to cohabitation with her husband. The uncontradicted medical evidence of Dr. Hendy, which must be looked at as a whole, establishes in my mind that while she was capable of exercising free and reasoned thought in other matters she was quite incapable of such exercise in relation to being under the same roof as her husband, or, indeed, any other man. Dr. Hendy described her case as exceptional, and was of the opinion that a return to her husband would be disastrous to her mental health. As I have said, for my part I cannot, in these extreme circumstances, regard her as a deserter.

If I am right then we are left with the situation that neither party is in desertion of the other. Neither party has a legitimate ground of complaint against the other, and I cannot see that the husband can be found guilty of wilful neglect to provide reasonable maintenance for his wife, for, on the evidence, I see no element of misconduct in his attitude. It may be that the answer to this difficult case lies in s. 42 and s. 43 of the National Assistance Act, 1948, but having in mind and agreeing with what the learned President has said, I think that this appeal should be dismissed.

Appeal dismissed.

Solicitors: *Dawson, Lancaster & Co.*, Hull (for the wife); *Smith & Hudson*, agents for *Williamson, Stephenson & Hepton*, Hull (for the husband).

[Reported by A. T. HOOLAHAN, Esq., Barrister-at-Law.]

PRACTICE DIRECTION.

Sale of Land—Sale by court—Auctioneers' remuneration.

Under the authority of the Lord Chancellor the basic scale of remuneration to be allowed in the Chancery Division to surveyors, auctioneers and estate agents on sales of freehold and leasehold property has been varied and is now:—

£3 15s. 0d. per cent. on the first £500 realised;

£1 17s. 6d. per cent. on the excess beyond £500 up to £5,000;

£1 2s. 6d. per cent. on the excess beyond £5,000 up to £25,000.

In other respects the existing directions of the Lord Chancellor and the judges of the Chancery Division as to auctioneers' remuneration remain unaltered.

MAURICE WILLMOTT,
Chief Master, Chancery Division.

Nov. 17, 1958.

A NORTH OF ENGLAND ZOOLOGICAL SOCIETY v. CHESTER
RURAL DISTRICT COUNCIL.

[CHANCERY DIVISION (Vaisey, J.), October 23, 24, 1958.]

B Rates—Limitation of rates chargeable—Zoo—Zoological society incorporated as company limited by guarantee—Main objects charitable—Organisation concerned with advancement of education—Rating and Valuation (Miscellaneous Provisions) Act, 1955 (4 & 5 Eliz. 2 c. 9), s. 8 (1) (a), (2).

Company—Memorandum of association—Object clauses—Distinction between objects and powers.

C The memorandum of association of a company limited by guarantee stated by cl. 3 the company's objects in twenty-six lettered paragraphs. Of these, the first four were: "(a) To . . . take over as a going concern and conduct as a scientific and educational undertaking the business [formerly carried on by another company] . . . (b) To promote, facilitate, and encourage the study of biology, zoology and animal physiology, aviculture, aquaria, ichthyology, entomology, botany and horticulture and all kindred sciences and to foster and develop among the people an interest in and knowledge of animal life. (c) To establish, equip, and carry on, and develop zoological parks or gardens and living zoological collections at such places as the society shall determine. (d) To establish sanctuaries for all kinds of wild life, particularly animal and bird sanctuaries and to police in such manner and do all things necessary for the protection of all animal and plant life therein."

E The remaining paragraphs provided for the holding of public meetings, publishing books, investing money, engaging orchestras, building and equipping restaurants and other buildings for the convenience of visitors, raising funds and other matters. The company claimed, in respect of the premises occupied by it, the benefit of the limitation of rates afforded by the Rating and Valuation (Miscellaneous Provisions) Act, 1955, s. 8 (1) (a), (2). The court found that the company was not established or conducted for profit.

F **Held:** the company's main objects were to be found in para. (a), para. (b), para. (c) and (possibly) para. (d) of cl. 3, the remaining paragraphs of cl. 3 containing powers and not objects properly so called; those main objects were charitable, or, even if not charitable were concerned with the advancement of education, and, therefore, the company was entitled to the benefit of limitation of rates under s. 8 (1), (2) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955.

G *Re Lopes* ([1931] 2 Ch. 130) applied.

H Dictum of LORD WRENBURY in *Cotman v. Brougham* ([1918] A.C. at p. 523) considered.

[**Editorial Note.** As regards the basis of assessment of zoological gardens, see *Surrey County Valuation Committee v. Chessington Zoo, Ltd.* ([1950] 1 All E. R. 154).

For the Rating and Valuation (Miscellaneous Provisions) Act, 1955, s. 8, see 35 HALSBURY'S STATUTES (2nd Edn.) 394.]

I Cases referred to:

(1) *Cotman v. Brougham*, [1918] A.C. 514; 87 L.J.Ch. 379; 119 L.T. 162; 9 Digest (Repl.) 647, 4305.

(2) *Re Cole, Ltd.*, [1945] 1 All E.R. 521 n.; 9 Digest (Repl.) 702, 4648.

(3) *Re Lopes, Bence-Jones v. Zoological Society of London*, [1931] 2 Ch. 130; 100 L.J.Ch. 295; 146 L.T. 8; 8 Digest (Repl.) 329, 115.

(4) *Brighton College v. Marriott*, [1926] A.C. 192; 134 L.T. 417; 28 Digest 24, 127.

- (5) *Berry v. St. Marylebone Corpn.*, [1957] 3 All E.R. 677; [1958] Ch. 406; A
3rd Digest Supp.
- (6) *National Deposit Friendly Society (Trustees) v. Skegness U.D.C.*, [1958]
2 All E.R. 601.

Adjourned Summons.

The plaintiffs, the North of England Zoological Society, a company limited by guarantee, who claimed to be entitled to the benefit of the provisions of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, s. 8, in respect of their Zoological Gardens and premises at Upton-by-Chester, in the county of Chester, applied to the court by originating summons for the determination of the following questions: whether on the true construction of s. 8 (1) (a) of the Act of 1955, the plaintiff society was an organisation which was not established for profit and whose main objects were charitable or were otherwise concerned with the advancement of religion, education or social welfare. B C

The society was incorporated on May 9, 1934, under the Companies Act, 1929, as a company limited by guarantee. The memorandum of association by cl. 3 stated that:

"The objects of the society are: (a) To acquire and take over as a going concern and conduct as a scientific and educational undertaking [the business formerly carried on, as the Chester Zoological Gardens, by a limited company] together with or any part of the real and personal property and assets of the [former] company used in connexion with that business or belonging thereto. D

"(b) To promote, facilitate, and encourage the study of biology, zoology and animal physiology, aviculture, aquaria, ichthyology, entomology, botany and horticulture and all kindred sciences and to foster and develop among the people an interest in and knowledge of animal life. E

"(c) To establish, equip, and carry on, and develop zoological parks or gardens and living zoological collections at such places as the society shall determine. F

"(d) To establish sanctuaries for all kinds of wild life, particularly animal and bird sanctuaries and to police in such manner and do all things necessary for the protection of all animal and plant life therein."

Then followed some twenty-two lettered paragraphs (f) to (aa)) relating to various activities. These included: (k) To hold public meetings for the purpose of collecting contributions; (n) To publish books; (o) To borrow money and issue bonds, mortgages and debentures; (r) To invest money; (s) To engage, hire, or employ orchestras and musical performers; (v) To build and conduct for or without profit tea and dining rooms and anything which might be required for the convenience of visitors; and (w) Raising funds. All these paragraphs were set out without any distinction between main objects and ancillary objects. The society owned and managed zoological gardens of about 145 acres containing about 750 animals, birds and reptiles. The gardens were visited by over 500,000 persons annually of whom about 45,000 were school pupils who visited as part of their curriculum and admission fees were charged. About 130,000 meals were served yearly in addition to minor refreshments. There was no other catering establishment on the necessary scale within two miles and only visitors to the gardens were catered for. The capital value of the cafés and shops did not exceed, on estimate, ten per cent. of the value of the society's property, the capital value of which was estimated at about £130,000. The net surplus from the café receipts amounted to £3,400 in 1953; £1,300 in 1954; £4,200 in 1955; and £5,400 in 1956. The principal source of income was from admission fees. G H I

H. I. Willis, Q.C., and *J. F. Coplestone-Boughey* for the plaintiffs, the rate-payers.

G. D. Squibb, Q.C., and *D. G. Widdicombe* for the defendants, the Chester Rural District Council, the rating authority.

A VAISEY, J.: This is a summons issued by the North of England Zoological Society as plaintiffs, against the Chester Rural District Council as defendants. The plaintiffs carry on an organisation in the neighbourhood of the City of Chester, which is commonly known as the Chester Zoo. I take those words from an advertisement, calling attention to the amenities of the plaintiffs and their organisation, in the "Chester Chronicle", and I understand that it appeared

B in other local publications. The question asked is whether, on the true construction of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, s. 8 (1) (a), the plaintiffs are, in respect of their zoological gardens and premises at Upton-by-Chester, an organisation which is not established or conducted for profit and whose main objects are charitable or are otherwise concerned with the advancement of education. Section 8 (1) applies to

C "(a) any hereditament occupied for the purposes of an organisation (whether corporate or unincorporate) which is not established or conducted for profit and whose main objects are charitable or are otherwise concerned with the advancement of . . . education . . ."

The plaintiffs were incorporated on May 9, 1934, under the Companies Act, 1929, as a company limited by guarantee and not having a share capital. It

D seems to me that the only question which arises turns on what are the plaintiffs' main objects. In other words, which of its objects are main objects and which of its objects are not main objects. When I have found what the main objects are, I then have to ask myself, are those main objects charitable or not, because if they are charitable, then so far as that part of the sub-section is concerned the plaintiffs are within the ambit of s. 8.

E Very often in memoranda of association one finds a clause which says that every object is to be read independently of all the other objects and to have equal force with every object, and is not to be controlled or construed by reference to any other object or to the name of the company, and is to be read in isolation as meaning exactly what it says, without any sort of qualification. No such

F clause is to be found in the memorandum of association of the plaintiffs. Clause 3 of the memorandum enumerates what it calls the objects, and says nothing about their being construed independently of any other objects. It simply sets them out, lettered from (a) to (aa), and if those are the objects of the plaintiffs, which I must assume they are, in order to fit the plaintiffs' position in with the section, I have to find out which of the objects are the main objects.

G The expression "main objects" is nowhere defined, as far as I know. There is a fairly simple answer to this problem, because in my view there are two kinds of "objects" in this kind of document, i.e., objects which are properly so called, as distinguished from objects which are not in fact objects so much as powers. That is the point which is dealt with in *Cotman v. Brougham* (1) ([1918] A.C. 514), in the speech of LORD WRENBURY—than whom no greater authority on companies and the law of companies can be found—where he says (ibid., at p. 523):

H "There has grown up a pernicious practice of registering memoranda of association which, under the clause relating to objects, contain paragraph after paragraph not specifying or delimiting the proposed trade or purpose, but confusing power with purpose and indicating every class of act which the corporation is to have power to do."

I I may perhaps mention that the same comment was made by myself some years ago in *Re Cole, Ltd.* (2) ([1945] 1 All E.R. 521 n.). In that case I called attention to the importance of not inserting a clause, which had become so common, making every sub-clause, heading or objects clause, independent of the other objects and therefore to be construed in isolation. LORD WRENBURY's speech gives me the requisite clue to the proper significance to be attached to that phrase, "main objects". What is meant by "main objects" in s. 8 of the Act of 1955 is, those objects which are really objects, excluding those so-called objects which are in fact nothing more or less than powers. The distinction has been

drawn quite frequently, but I am quite content to base my decision on the conclusions of LORD WRENBURY in *Cotman v. Brougham* (1) [see p. 537, letter H, ante]. A

Looking at the memorandum of association of the plaintiffs, I find that the first object (para. (a)) is to acquire, take over and conduct as a scientific and educational undertaking the business formerly carried on as the Chester Zoological Gardens by a previous limited company. Those words seem to me to be plainly indicative of a charitable purpose. In para. (b), there is the second of the objects: B

"To promote, facilitate, and encourage the study of biology, zoology and animal physiology . . . botany and horticulture and all kindred sciences and to foster and develop among the people an interest in and knowledge of animal life."

That object seems to me to be plainly charitable. Paragraph (c) is: C

"To establish, equip, and carry on, and develop zoological parks or gardens and living zoological collections at such places as the society shall determine."

In my judgment, those three paragraphs give the proper objects of the plaintiffs, and I think that the other sub-clauses in the memorandum, though they are objects in a sense, are not really objects as much as powers. The rest of these enumerated activities, to use a neutral word, with the possible exception of the reference to bird sanctuaries, are not objects. I think they are ancillary powers to enable effect to be given to the main objects, which, if I may put it quite briefly, are to establish, run and carry on a zoological gardens or park. D

There one can stand on firm ground. Why were the plaintiffs incorporated? To take over and to run a zoological garden and a park. That, I believe, is the answer to the question which I posed. When we come to the subsidiary objects, which I for my part regard not so much as objects as powers, we find all kinds of things enumerated, e.g., such things as holding public meetings, publishing books, investing moneys, engaging bands and orchestras, building and equipping restaurants, and other buildings for the convenience—as the clause says—of visitors to the society's undertaking, raising funds, applying to the authorities for licences, adopting a badge and so forth. All those are objects, but they are not objects for which the company was formed. I think that they are merely powers. I have some guidance from a decision of FARWELL, J., in *Re Lopes, Bence-Jones v. Zoological Society of London* (3) ([1931] 2 Ch. 130), which related to a famous zoological society, the Zoological Society of London. There G the headnote says:

"The objects of the Zoological Society of London as defined by its charter are 'the advancement of zoology and animal physiology and the introduction of new and curious subjects of the animal kingdom'. Held, that the first object was clearly educational and the second object, being on construction merely in aid of the first, was also educational and (semble) it was educational in itself. The society was therefore an educational charity, although in carrying out its objects it was found necessary to provide its pupils with food and amusement. Held, also, that the second object necessitated and involved the upkeep and improvement of zoological gardens." H

I do not want anyone to suppose that I am holding that anything which calls itself a zoo or zoological gardens is necessarily charitable, and that it necessarily comes within the authority of *Re Lopes* (3). I can imagine all kinds of cases where the presence of animals in an enclosed park or grounds is merely colourable, but I see no ground whatever for differentiating the present case, the case of the Chester zoo, from the case of the London zoo on which FARWELL, J., gave his decision in *Re Lopes* (3). There the charter was very simple. Only two objects were mentioned, the first the main object, the second ancillary, and FARWELL, J., held as an alternative that the second was also a charitable, I

A educational activity. I have been furnished by counsel with the present powers and bye-laws of the London zoo. There has been a supplemental charter in that case, and the charter which FARWELL, J., had before him is set out in the printed document which is now before me, but it does not throw any further light on the matter than what I can derive from the report itself.

B The question has been raised whether this is a profit-making organisation in spite of the protestation against the making of profit which is to be found in its memorandum, but I am not convinced about that. I think that there was no question of profit here, and that the making of profit does not really enter into this matter at all. Counsel for the defendants argued that there was a serious point there, but he did not elaborate it to any great extent. He referred me to *Brighton College v. Marriott* (4) ([1926] A.C. 192). I do not propose to go into that part of the argument, because counsel did not put it forward as the main point in his case, and indeed I do not think that it really arises, although if this case is carried to a higher court he could advance there an argument based on the question of profit or no profit. I need say no more about it.

C The cases to which I have been referred on s. 8 (1) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, are *Berry v. St. Marylebone Corpn.* (5) ([1957] 3 All E.R. 677) and *National Deposit Friendly Society (Trustees) v. Skegness U.D.C.* (6) ([1958] 2 All E.R. 601), which was a decision of the House of Lords. Each of those cases shows that I have to find that all the main objects are charitable, not merely some or one of them, and I have come to the conclusion that the main objects, which I have identified as being those in para. (a), para. (b), para. (c) and possibly para. (d) of cl. 3 of the memorandum, are charitable, and that they together constitute what the section refers to as the main objects of the plaintiffs.

E I come to the conclusion on the evidence that the main objects for which the plaintiffs were established were all of them charitable, which seems to me to conclude in their favour their claim to come within s. 8 (1) (a). I need not, therefore, decide whether those objects are otherwise concerned with the advancement of education, but, even if they were not charitable, I think that they have certainly been concerned with the advancement of education. In consequence I have come to the conclusion that the plaintiffs are within the purview of the sub-section.

Order accordingly.

G Solicitors: *Field, Roscoe & Co.*, agents for *Ouseley-Smith & Co.*, Chester (for the plaintiffs); *Preston, Lane Claydon & O'Kelly*, agents for *Gamon & Co.*, Chester (for the defendants).

[Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.]

H PRACTICE DIRECTION.

PROBATE, DIVORCE AND ADMIRALTY DIVISION.

Divorce—Appeal—Divisional Court—Appeal from order of magistrates' court—Appellant's solicitor to certify whether any other matrimonial proceedings pending.

I The President has directed that to enable the clerk of the rules, when listing a Divisional Court appeal against a magistrates' court order, to have due regard to any other matrimonial proceedings pending between the same parties, the appellant's solicitor should certify whether any such proceedings exist.

B. LONG,
Senior Registrar.

G. L. BAKER, LTD. v. MEDWAY BUILDING AND SUPPLIES, LTD.

[COURT OF APPEAL (Jenkins, Romer and Willmer, L.J.J.), October 27, 28, 29, 30, 1958.]

Pleading—Amendment—Leave—Appeal against refusal of leave to amend defence at trial—Principle on which discretion to give leave to amend should be exercised—Whether Court of Appeal would interfere with exercise of discretion by trial judge—Whether amendment should be formulated in writing at trial or on appeal—R.S.C., Ord. 28, r. 1—R.S.C., Ord. 58, r. 3 (2).

The plaintiffs entrusted T., who was the plaintiffs' auditor and at material times a director of the defendants, with a large sum of money. T. made payments out of this money to the defendants. More than six years later the plaintiffs brought an action against the defendants to recover the sums paid to them by T., alleging that the defendants had received the sums with notice that they were paid by T. in breach of trust and claiming them "as the plaintiffs' money traceable in equity". The defendants denied that the payments were made in breach of trust and that they had notice of any breach of trust. The defence contained no allegation that the defendants gave value for the money received from T., nor that they had parted with the money so received, but the defence did not, on a fair reading, contain an admission that the defendants still retained the money or property into which it could be traced. At the trial the plaintiffs put their case on personal liability in equity (to which the defence of purchase for value without notice would, on the basis of a dictum of DENNING, J., in *Nelson v. Larholt* ([1947] 2 All E.R. at p. 752), be the sole defence), and not on the principle of tracing trust money into the hands of a person who retained it or property representing it. The defendants thereupon applied under R.S.C., Ord. 28, r. 1, for leave to amend by pleading that they were purchasers for value without notice. They did not tender a formulated written amendment. The trial judge refused leave and the case was tried on the pleadings as they stood, judgment being given for the plaintiffs. The defendants appealed against the decision and, in the alternative, against the refusal of leave to amend, asking also for a new trial. The Court of Appeal put the defendants to election whether to appeal against the judgment or to ask leave to amend, and the defendants elected to ask leave to amend. On the third day of the hearing of the appeal the defendants put in evidence a written amendment exhibited to an affidavit showing substantial grounds for maintaining the defence of purchase for value without notice.

Held: (i) leave to amend would be granted and a new trial would be ordered for the following reasons:

(a) the statement of claim did not show that the plaintiffs' claim was to be put on the ground of personal liability in equity as distinct from tracing trust money, and the refusal of leave to the defendants to amend by pleading that they were purchasers for value without notice would deprive them of what would possibly be their only effective defence to a claim so put, and accordingly

(b) the trial judge had erred in principle, since the amendment involved no loss or detriment to the plaintiffs which could not be made good by an appropriate order as to costs and injustice might be done if the amendment were not allowed; and in those circumstances the Court of Appeal should reverse the discretion exercised by the trial judge.

Tildesley v. Harper ((1878), 10 Ch.D. 393) and dictum of SIR WILLIAM BRETT, M.R., in *Clarapede v. Commercial Union Assn.* ((1883), 32 W.R. 263) applied.

(ii) the nature of the amendment proposed at the trial had been clear, and

A it was not necessary to have applied for an adjournment to formulate its exact terms in writing in order that they might be submitted to the trial judge before he rejected them.

Derrick v. Williams ([1939] 2 All E.R. 559) distinguished.

B Per WILLMER, L.J.: the provisions of R.S.C., Ord. 58, r. 3 (2), appear to necessitate the proposed amendment being formulated in the notice of appeal, where the appeal is for leave to amend (see p. 554, letter F, post).

Order of DANCKWERTS, J. ([1958] 2 All E.R. 532) discharged.

[As to leave to amend pleadings, see 25 HALSBURY'S LAWS (2nd Edn.) 258, para. 425.]

C Cases referred to:

(1) *Ministry of Health v. Simpson*, [1950] 2 All E.R. 1137; [1951] A.C. 251; 2nd Digest Supp.

(2) *Nelson v. Larholt*, [1947] 2 All E.R. 751; [1948] 1 K.B. 339; [1948] L.J.R. 340; 2nd Digest Supp.

D (3) *Lowther v. Heaver*, (1889), 41 Ch.D. 248; 58 L.J.Ch. 482; 60 L.T. 310; 12 Digest (Repl.) 540, 4097.

(4) *Edevain v. Cohen*, (1889), 41 Ch.D. 563; *affd.* C.A., (1889), 43 Ch.D. 187; 62 L.T. 17; 21 Digest 235, 647.

(5) *Ellis v. Manchester Carriage Co.*, (1876), 2 C.P.D. 13; 35 L.T. 476; 19 Digest 40, 214.

E (6) *Tildesley v. Harper*, (1878), 10 Ch.D. 393; 48 L.J.Ch. 495; 39 L.T. 552; Digest (Pleading) 47, 386.

(7) *Clarapede v. Commercial Union Assocn.*, (1883), 32 W.R. 262.

(8) *Esso Petroleum Co., Ltd. v. Southport Corpn.*, [1955] 3 All E.R. 864; [1956] A.C. 218; 120 J.P. 54; 3rd Digest Supp.

(9) *Derrick v. Williams*, [1939] 2 All E.R. 559; 160 L.T. 589; Digest Supp.

Appeal.

F The defendants appealed from an order of DANCKWERTS, J., dated June 4, 1958, and reported [1958] 2 All E.R. 532, whereby he awarded the plaintiffs £6,161 9s. 11d. and costs. For the reasons given in the judgment of JENKINS, L.J., in which the facts, which are summarised in the headnote, are stated in full, this appeal became confined to an appeal against the refusal of DANCKWERTS, J., to allow the defendants' application, made during the trial, to amend their

G defence.

Geoffrey Cross, Q.C., and *C. A. Settle* for the defendants.

N. N. McKinnon, Q.C., and *M. O. Stranders* for the plaintiffs.

H JENKINS, L.J.: This is an appeal from an order of DANCKWERTS, J., dated June 4, 1958, in favour of the plaintiffs, G. L. Baker, Ltd., for a sum of £6,161 9s. 11d. and costs. The defendants, Medway Building and Supplies, Ltd., by their notice of appeal ask that that order should be reversed with an order for costs in the defendants' favour and ask in the alternative that the defendants may be given leave to amend their defence and that a new trial may be ordered. The grounds of appeal include para. 3, which deals with that matter in these terms:

I "That the learned judge in the exercise of his discretion ought to have acceded to the defendants' application made during the trial to amend the defence and to have granted an adjournment for that purpose."

On the appeal being opened before us by counsel for the defendants, after we had heard some submissions of his on the merits of the case, we expressed the view that he should elect either to prosecute his appeal on the pleadings as they stood or else to make his application for leave to amend. We thought that it would be wrong to allow him to develop his case on the unamended pleadings and then

in the event of failure, to claim that he should be able to pursue the question of amendment and argue the case de novo on the amended pleadings, if leave to amend were given. A

The nature of the case is this. The plaintiffs on two dates in March, 1950, entrusted a chartered accountant, one George Eric Titley, the plaintiffs' auditor, with a large sum of money amounting to some £80,000, being money of the plaintiffs. It is unnecessary to consider the circumstances in which that sum became payable, for it is common ground that it was a sum of money belonging to the plaintiffs and that it was paid over to George Eric Titley. Titley on receipt of the money paid it into his own private business account. Then on Mar. 4, 1950, by a cheque drawn on his private business account he paid the sum of £3,268 0s. 5d. to the defendants and on Mar. 22 he paid in a similar manner by a cheque drawn on his private business account the sum of £2,893 9s. 6d. to the defendants, making the total of £6,161 9s. 11d. for which judgment was awarded to the plaintiffs by the learned judge. Those payments having been made on Mar. 4 and 22, 1950, the plaintiffs by their writ in the action issued on May 2, 1957, that is to say more than six years after the date of the payment, claimed against the defendants the relief appearing from the statement of claim, which I next read. B C

The statement of claim begins by identifying Titley in para. 1 and in para. 2 states how Titley was entrusted with the plaintiffs' money. There is no dispute about those matters. It proceeds as follows in para. 3: D

"Without the knowledge or consent of the plaintiff company, fraudulently and in breach of trust the said Titley paid part of the said moneys to the defendant [then there is this, which was added by way of amendment] which thereby through its said director Titley had notice of the fraudulent breach of trust thereby committed and was and is a trustee for the plaintiff company of the said moneys." E

Then the payments by means of the two cheques, to which I have referred, were particularised. Then para. 4 follows: F

"By letter dated Apr. 10, 1957, the plaintiff company by its solicitors, Messrs. Bell & Ackroyd, lawfully demanded repayment of the said moneys and the defendant wrongfully detains the same." F

Then there is this prayer:

"And the plaintiff claims: (a) the said sum of £6,161 9s. 11d. (1) as the money had and received to the use of the plaintiff company; alternatively (2) as damages for money wrongfully detained alternatively converted by the defendant." G

Nothing turns on those two claims for the purposes of this appeal. The learned judge did not, as far as I understand the matter, deal with them, and their application in the circumstances of this case would be fraught with difficulty. The claim is put in the alternative: "(3) As the plaintiffs' money traceable in equity", and then consequential relief is claimed, with which I need not trouble. H

Pausing there, that pleading appears to me to base the plaintiffs' claim primarily on the ground of constructive trusteeship due to the fact that the defendants received the money with knowledge that it was money of the plaintiffs. One would also understand from the statement of claim that a claim was being made in respect of the moneys on the basis of the equitable doctrine of tracing in the form which, until recently, was I think commonly attributed to it, and on that basis it would seem from the terms of the pleading that the plaintiffs were claiming that, irrespective of notice, the money wrongfully paid to the defendants was still in their hands either in its original form or in some other form which could be identified with the original sum paid. It is no doubt true that the function of a statement of claim is to plead the facts on which the plaintiff relies and that he is not strictly obliged to plead law, but here it does seem to me I

- A that any person of ordinary experience reading the statement of claim would consider that the matters in issue were confined to those which I have described and would not appreciate that on this pleading it was intended not merely to make out a claim of tracing in the old and restricted form, but also to rely on the personal liability in equity which was held to exist in *Ministry of Health v. Simpson* (1) ([1950] 2 All E.R. 1137) and which was referred to in sweeping terms
- B by DENNING, J., in *Nelson v. Larholt* (2) ([1947] 2 All E.R. 751). According to the doctrine as enunciated by DENNING, J., a person who receives trust money, as I understand it, irrespective of notice is liable to make it good even after he has parted with the money, and so the liability passes from hand to hand so that anyone who has had the money at any stage is liable unless and until it comes into the hands of some person who can claim to be a purchaser for value without
- C notice. If the claim was to be put in that way it would obviously be vital for the defence to raise, if they could, a case of purchaser for value without notice, which, as I understand it, would be their only effective shield to a claim on the principle enunciated by DENNING, J.

The statement of claim being in the form which I have read, the defendants put in this defence. They admitted para. 1; they made no admission as to para. 2 although there is actually, I think, no serious dispute about that, and then by para. 3 of the defence they said:

- E “The defendant admits that Titley paid to the defendant two respective sums of £3,268 0s. 5d. and £2,893 9s. 6d. by two respective cheques on or about Mar. 4 and Mar. 20, 1950, respectively. The defendant does not admit that the said payments were made either fraudulently or in breach of trust. If which is not admitted the said payments or either of them were made either fraudulently or in breach of trust the defendant denies that it had notice of such fraud or breach of trust. The defendant denies that it was at any time and denies that it is now a trustee of the said respective sums of £3,268 0s. 5d. and £2,893 9s. 6d. or either of such sums for the plaintiff.”
- F So far then the allegation of notice is traversed and the allegation of constructive trusteeship based on notice is also traversed. Then comes this paragraph on which there has been much debate:

“(4) The defendant admits the letter dated Apr. 10, 1957. The defendant denies that its retention of the said respective sums of £3,269 0s. 5d. and £2,893 9s. 6d. or either of them is or was at any time wrongful.”

- G That paragraph should, I think, be read in conjunction with para. 4 of the statement of claim which I will read again:

“By letter dated Apr. 10, 1957, the plaintiff company by its solicitors, Messrs. Bell & Ackroyd, lawfully demanded repayment of the said moneys and the defendant wrongfully detains the same.”

- H Paragraph 4 of the defence, as I read it, was clearly intended as a traverse of that. In the circumstances it would really be unreasonable to hold the defendants to it as an admission that they retained in their hands the actual identical sums of money or those sums in traceable form. I think a fair reading of it is that while the letter is admitted, the defendants say they have done nothing wrong in refusing to comply with the letter by paying over the amount claimed. Then
- I in para. 5 of the defence the Limitation Act, 1939, s. 2 and s. 3, are pleaded in addition to all other defences. Then there is this:

“6. The statement of claim does not disclose any cause of action which would entitle the plaintiff to the relief claimed in para. 3 of the prayer to the statement of claim.”

That read in conjunction with para. 4 reinforces to my mind what I have said about the reasonable construction to place on para. 4 of the defence. Now it will be observed that in that defence there is no allegation that the money was

paid to the defendants for valuable consideration, that is to say, the allegation A that the defendants were purchasers for value without notice, as one may loosely describe it, was not raised. Further, there is no positive allegation that the defendants had parted with the money. One cannot find any satisfactory allegation of that, but, on the other hand, one finds in para. 4 and para. 6 something amounting by implication to a plea that the defendants no longer had the money. I cannot regard as a serious defect in the pleading the fact that it did not B allege the paying away of the money because if one looks at the matter from a common-sense point of view, it was in the highest degree improbable that six years after the cheques had been paid the proceeds remained in the coffers or bank account of the defendants either in the form which they originally took, that is to say, sums of cash, or in the form of some identifiable property into which the cash had been converted. The learned judge did not at the trial hold the C defendants to any such admission, that is to say, to any admission that the defendants still had the money in their hands.

When the matter came before the learned judge, as I understand the course of events, counsel for the plaintiffs opened his case on the footing that he was entitled to succeed on the strength of admissions in the defence; in other words, as I understand it, he said that the receipt of these cheques was admitted and it D was not alleged that they had been paid away; on the contrary, counsel for the plaintiffs relied on para. 4 as an admission that they still owed the money and said that the defendants had not raised the plea of purchaser for value without notice. Consequently it was submitted that the plaintiffs were virtually entitled to succeed on the ground that the defendants had raised no effective defence at all. Mr. Settle (junior counsel for the defendants), whom we all know as a very E experienced pleader, has told us that on the claim as it stood it did not appear to him to be necessary to raise a case of purchaser for value without notice because the plaintiffs' case was a case of constructive trusteeship, which would be defeated by absence of notice, and of tracing in its old sense, that is to say, identifying in the hands of the defendants either the money or something that could be identified as representing it. The plaintiffs' case standing thus, I think that there is F justification for the view that it would not be necessary to raise the defence of purchaser for value without notice. Junior counsel for the defendants says that when the case was opened by counsel for the plaintiffs, he then appreciated for the first time that the case was being put against him as a case for the application of the principle stated by DENNING, J., in *Nelson v. Larholt* (2), and that when he appreciated that this was the case which he had to meet, he asked the learned G judge for leave to amend by pleading purchase for value without notice. The learned judge refused that application out of hand; he thought that it was too late to make it and he thought that it would cause hardship to the plaintiffs. We are told that he said in the course of his interlocutory observations on this matter that the defendants had really failed so far to raise any proper pleading H in answer to the claim and ought not to be allowed, at the last moment, for the first time to add a defence which was necessary, so to speak, in order to get their case on its legs. One finds this reference to the application in the judgment of the learned judge ([1958] 2 All E.R. at p. 534):

"It is not very clear whether the plaintiff alleges that the defendant has I still got the moneys and it is not at all clear whether the defendant is not admitting that it has retained the moneys and has still got them. There is no evidence on that matter before me and it would be, I presume, very unusual if the defendant still retained any part of the sums in question after this lapse of time has occurred between the payments and the issue of the writ in the action. This, however, is plain, that though fraud is denied there is not in terms a claim on behalf of the defendant that it acted innocently and bona fide—perhaps it is more a matter of inference—and there is no claim that the defendant gave value for the cheques which were handed by Titley

A to it. An application was made on behalf of the defendant for leave to amend so as to allege the giving of value. At the date when this application was made, which was only after the point had been realised on the case being opened, it seemed to me that it was not proper for me to allow the amendment, and I refused the application."

B Then I think it is material to refer to this passage where the learned judge says (*ibid.*):

"There is one point which I can deal with first of all without very much difficulty",

and that was the matter of notice with which it was sought to saddle the defendants on the strength of the fact that Titley was one of the defendants' directors.

C The learned judge dismissed that as concluded against the plaintiffs by authority. Having done that he proceeded in these terms (*ibid.*):

"That being the case, does the action lie against the defendant to recover the moneys which it received, whether or not it is to be taken as still retaining the money? The action really is not based on the fact of retention, even if it may be said to be alleged in the pleadings . . . Applying that to the present case, it seems to me that in order to defeat the action the defendant must establish, and the onus is on it to establish, that it satisfies those conditions, viz., that it received the money in good faith and for value and without notice of the want of authority. I will assume that it received the money in good faith and it is plain that it received it without notice of the want of authority, but it has not been able to establish, and it is not entitled to establish on the pleadings, that it gave value. Consequently, it seems to me that the action would *prima facie* succeed unless it is defeated by the Limitation Act, 1939."

Then the learned judge in the course of the remaining part of his judgment dealt with the question of the statute of limitations and held that the defendants were not entitled to avail themselves of it.

F That, in brief, is the course the matter took at the trial, and it is to be observed that the learned judge in refusing leave to amend fully appreciated that on the view he took of the law the effect of refusing such leave would mean that the defence must necessarily fail. It also appears from the passages which I have read that the learned judge was in considerable doubt as to the precise issues raised on the pleadings. In those circumstances counsel for the defendants says that, though it is no doubt true that this court will be reluctant to make an order for amendment in a case in which an application for such amendment has been refused by the court below on an application made at the hearing and that such late amendments ought to be sparingly allowed, yet in the present case it can be said that the obscurity of the statement of claim and its failure to make it clear what relief was being sought contributed in a substantial degree to the omission of the plea of purchase for value, which it is now sought to introduce. I have sufficiently discussed the terms of the pleadings and I will not return to them again. I think that counsel for the defendants' argument on that is well founded. At the same time I think that a particularly circumspect pleader, on the principle that it is useful to have as many strings to one's bow as possible, might have been expected to add for good measure the plea of purchaser for value to his defence. Nevertheless, it does appear to me that this omission was to a great extent due to the form of the statement of claim. I think that this consideration is of considerable assistance to the defendants' present application. One cannot regard this simply as a matter of carelessness or at all as a matter of a party, if I may use a colloquialism, sitting on the fence with an amendment in reserve to be produced if the case did not go well on the existing pleading. It was a genuine misunderstanding by an experienced pleader of a somewhat obscurely formulated statement of claim.

I should next make some reference to the principle to be followed in granting or refusing leave to amend, and I start by saying that there is no doubt whatever that the granting or refusal of an application for such leave is eminently a matter for the discretion of the learned judge with which this court should not in ordinary circumstances interfere unless satisfied that the learned judge has applied a wrong principle or can be said to have reached a conclusion which would work a manifest injustice between the parties. Bearing that in mind, I will refer to some of the authorities read in the course of the very full argument on this matter. One begins with R.S.C., Ord. 28, r. 1, which is in these terms:

"The court or a judge may, at any stage of the proceedings, allow either party to alter or amend his indorsement or pleadings, in such manner and on such terms as may be just and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties."

I repeat the second half of the rule "and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties". I do not read the word "shall" there as making the remaining part of the rule obligatory in all circumstances, but there is no doubt whatever that it is a guiding principle of cardinal importance on this question that, generally speaking, all such amendments ought to be made "as may be necessary for the purpose of determining the real questions in controversy between the parties". It appears to me that the pleadings as they stood when the matter came before the learned judge were not in this case so framed as to enable the real question in controversy to be determined. The case shown on the pleadings was a case which had no relation to any remotely probable state of facts. It was contrary to all probability that this money should still exist in the hands of the defendants in its original form of cash or in some other identifiable form. It was further in the highest degree improbable that the cheques were paid over by Titley without something in the way of consideration. It is clearly an assumption far removed from any probable state of facts that Titley should have paid these cheques as gifts or presents to the defendant company, taking as a mere volunteer. Mr. McKinnon, who had said all that possibly could be said on the plaintiffs' side, says that nevertheless leave to amend should not be given in this case and that the learned judge rightly refused it in the exercise of his discretion.

Counsel for the plaintiffs puts it that the matters on which the defendants now seek to rely in support of the proposed pleading, as it will stand if their amendment is allowed, must have been known to them long before the trial, and it would be a hardship on the plaintiffs and wrong in principle now to let the defendants raise this new matter. I regard that submission as deprived of a great deal of its force by the circumstances which I have already mentioned in relation to the form of the statement of claim. Then counsel for the plaintiffs referred us to a number of authorities, mostly in cases in which leave to amend was refused. As to these authorities, one may observe that the circumstances in which amendments may be sought are infinitely various, and a decision against an amendment in the particular circumstances of one case may be no ground for refusing leave in another. The first of these authorities is *Lowther v. Heaver* (3) ((1889), 41 Ch.D. 248). That was a case in which, under some form of building contract, the defendant was to grant leases to the plaintiff as and when certain houses were completed and roofed in, and the defendant having failed to grant the leases and having been sued by the plaintiff for an order compelling him to grant them, raised a defence which said nothing whatever about the roofing in, and he then asked leave to amend his defence by adding an allegation that the houses had not been roofed in. There was an application at the hearing before KEKEWICH, J., to add this allegation, KEKEWICH, J., refused leave to make that amendment, and his decision was upheld in this court. However, the case was a very different one from the present. COTTON, L.J., said (*ibid.*, at p. 262):

A "I think that KEKEWICH, J., was right in refusing to give him any such leave. Mr. Heaven was, at least from June, 1887, residing constantly in the neighbourhood of this property, was frequently seeing it, and knew what the state of it was, and yet when he comes to defend and account for his refusing to grant leases he does not allege that these buildings were not roofed-in as required by the agreement. If in fact they were not roofed-in at the time when he took possession, then the plaintiff would have no right to have leases granted. Mr. Heaven took possession on Sept. 1, 1887, and when leases were asked for he did not say, 'You are not entitled to leases because these buildings are not roofed-in as the agreement required'. In my opinion, as he has taken that course, and has not referred to want of roofing-in in para. 10 of his defence, we ought not to allow him to amend his pleadings in order to raise that question."

From that passage it appears that the court's refusal of leave to amend there was based in great measure on the fact that the amendment was contrary to the whole previous course of the defendant's conduct. Then LINDLEY, L.J., said this (*ibid.*, at p. 266):

D "So far as the pleadings go the defendant has admitted that the plots were roofed-in, whatever that means. I should not myself attach very much importance to that if I thought that the admission was a slip or an oversight, but on the evidence we find that the main buildings were completely roofed-in, and that there was nothing wanting except the zinc covering of a small part of the erections . . ."

E A little later on he says:

"... I am satisfied that, according to the true meaning of the parties, the buildings were roofed-in, or, at all events, if they were not roofed-in, it was for the defendant to raise that point and prove it . . . Ought we, then, to give him liberty to amend in order to raise such a point? I should say unquestionably we ought not. I am satisfied that it is merely an afterthought.

F It is a mere straw at which a drowning man is catching, and there is no substance in it."

That appears to me to be an entirely different case from the present one.

Then there is *Edevain v. Cohen* (4) ((1889), 41 Ch.D. 563), before NORTH, J. I need not go into the facts of that case, but again it was a very different kind of case from this one. The learned judge said this (*ibid.*, at p. 567):

G "It is quite clear to me that to some extent they could now assign effectively [that is the plaintiffs]; therefore I cannot simply allow it now without either putting the plaintiffs in a position in which I ought not to allow them to be put by such amendment being made at the last moment, or I should have to direct the matter to stand over in order that they may amend their pleadings and go into further evidence, which would have to be taken before the court for the purpose of getting definite information on definite points to which, [and this is, I think, important] although all the evidence has been taken with the knowledge that this amendment would be asked for, the attention of the parties and the counsel on the other side has not been drawn, and without going into which evidence it would be impossible to do justice to the plaintiffs; because at any rate, if the defence were held and allowed to be good, I could not without that fresh evidence give them the benefit of the new assignment, upon which I see clearly they must, to some extent, succeed."

From that passage it appears to me that the parties seeking the amendment had, as it were, stood by at the trial and had not called the other side's attention to this point. There is no ingredient of that sort in the present case. The same case went to the Court of Appeal (reported (1889), 43 Ch.D. 187). NORTH, J.'s decision was upheld by this court. COTTON, L.J., said this (*ibid.*, at p. 189):

"In dealing with this appeal I will first of all consider what case the appellant is entitled to raise having regard to the pleadings. [Then he discussed that and went on:] The contention of the appellant, however, is that he is only raising a point of law, not an issue of fact. But that is not so; the amendment would raise facts to enable a point of law to be relied upon; and those facts ought, according to the rule, to have been pleaded by the present appellant in answer to this action. Then it is said that the appellant ought to have liberty to amend his pleadings. An application to that effect was made to NORTH, J., and the learned judge, after he had heard all the evidence, refused leave to amend. That was done by him in the exercise of his discretion, and that fact alone, to my mind, is a strong reason to induce us now to refuse leave to amend. Another strong reason is this. I do not think that this amendment is necessary to bring out the real question between the parties. I think this amendment is proposed merely to enable the appellant to avail himself of what I may call a technical rule of law supported by the cases which have been referred to, and not in order to determine the real issue which ought to be determined in this action."

The learned lord justice points out that the question of amendment was not raised until a late stage at the hearing. That again appears to me to be a very different case.

I can pass over very shortly *Ellis v. Manchester Carriage Co.* (5) ((1876), 2 C.P.D. 13), for that was, as I understand it, a case in which there was an action for the obstruction of the plaintiff's lights and the plaintiff sought to amend by introducing a claim that the building obstructing his lights also obstructed a right of way to which he was entitled. The court held, not unnaturally, that that was an entirely different claim and they refused to grant leave to raise it by amendment. GROVE, J., said (*ibid.*, at p. 16):

"The amendment asked was, I think, properly refused: it would have introduced an entirely different case from that which the defendants came prepared to meet. So far as the lights were concerned, the defendants had a clear right to obstruct them."

Then a case where the decision went the other way, to which we were very properly referred by counsel for the plaintiffs, is *Tildesley v. Harper* (6) ((1878), 10 Ch.D. 393) which in a way is a locus classicus because it contains the oft-quoted judgment of BRAMWELL, L.J., on the question of the amendment of pleadings.

"In an action against a lessee to set aside a lease granted under a power, the statement of claim stated that the donee of the power had received a specified sum as a bribe, and stated the circumstances; the statement of defence denied that that particular sum had been given, and denied each circumstance, but contained no general denial of a bribe having been given. FRY, J., having held that the denial was evasive, and amounted to an admission that some bribe had been given, and having refused leave to amend the statement of defence: *Held*, by the Court of Appeal, that leave to amend the statement of defence ought to be given."

BAGGALLAY, L.J., said this (*ibid.*, at p. 396):

"We all think that leave to amend ought to be given. The order will be to discharge the judgment of FRY, J., with liberty to the defendant to amend his statement of defence; the plaintiffs to pay the costs of the appeal; and the costs of the day of trial in the court below to be costs in the cause. The plaintiffs will also be at liberty to amend their pleadings."

BRAMWELL, L.J., said in the third line of his judgment (*ibid.*):

"I have had much to do in chambers with applications for leave to amend, and I may perhaps be allowed to say that this humble branch of learning is very familiar to me. My practice has always been to give leave to amend un-

- A less I have been satisfied that the party applying was acting mala fide, or that, by his blunder, he had done some injury to his opponent which could not be compensated for by costs or otherwise. I confess that if the present case had come before me I should have had some doubt whether the defendant had made a bona fide mistake, as the mistake is so very obvious. I should probably have required some affidavit or statement by the solicitor to show that the slip in the pleading was a bona fide one, and if satisfied on that point, I should not have refused leave to amend."

Then a little further on, at the end of his judgment he said (*ibid.*, at p. 397):

- C "It is quite right that the rules of the court should be observed, and that a party should be fined for his mistake, but the fine should be measured by the loss to the other side, and not by the importance of the stake between the parties."

THESIGER, L.J., said this (*ibid.*):

- D "I am also of opinion that it is important that the rules of the court as to pleading should be enforced, but this may be done at too great a price. The object of these rules is to obtain a correct issue between the parties, and when an error has been made it is not intended that the party making the mistake should be mulcted in the loss of the trial."

- E The passage from the judgment of BRAMWELL, L.J., to which I have referred, is quoted in the ANNUAL PRACTICE in the notes to R.S.C., Ord. 28, r. 1 (1959 Edn. at p. 622) and it is immediately followed by a quotation from the judgment of Sir WILLIAM BRETT, M.R., in *Clarapede v. Commercial Union Asscn.* (7) ((1883), 32 W.R. 262), as follows (*ibid.*, at p. 263):

"However negligent or careless may have been the first omission, and however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side. There is no injustice if the other side can be compensated by costs."

- F It appears, therefore, that in the present case the learned judge ought in the exercise of his discretion to have granted this amendment if it appeared that this would involve no loss or detriment to the plaintiffs which could not be made good to them by an appropriate order as to costs. It should have been apparent to the learned judge, and indeed it was apparent to him, that this was a vital point in the case and that unless it was adjudicated on, the real matter in issue between the parties would not be decided, for the case would proceed on an assumed state of the facts which, more likely than not, was wholly at variance with and bore no relation to the true facts of the case. Accordingly, in refusing this leave to amend out of hand, it does appear to me that the learned judge here proceeded on a wrong principle. As to responsibility for the inadequacy of the defence, I have already expressed my view about that and I will not discuss that aspect of the case further, except to say that it is observable that in his judgment the learned judge said ([1958] 2 All E.R. at p. 534):

- H "At the date when this application was made, which was only after the point had been realised on the case being opened, it seemed to me that it was not proper for me to allow the amendment, and I refused the application."

- I If the point was taken as soon as it was realised on the case being opened, then all the more reason, I should have thought, to have granted leave to amend.

We were also referred by counsel for the plaintiffs to one or two other cases. We were referred to *Esso Petroleum Co., Ltd. v. Southport Corpn.* (8) ([1955] 3 All E.R. 864) in the House of Lords. That case, which was cited by counsel for the plaintiffs for the observations of LORD MORTON OF HENRYTON, was not a case of amendment at all. It was a case in which this court, in the view of the House of Lords, had decided an appeal on an issue which had not been raised in

the pleadings, and the observations of the learned law lords were directed to bringing out the importance of deciding cases *secundum allegata et probata* and not on the strength of issues which had not been properly formulated in the pleading. I do not see how any assistance can be derived from that case, except possibly this in the defendants' favour, that pleadings ought to be amended where it can reasonably be done so as to ensure that any issues on which the case is likely to turn are properly pleaded, for if they are not pleaded they ought to be disregarded. A B

Then there was *Derrick v. Williams* (9) ([1939] 2 All E.R. 559), which is to the effect that where leave is given to amend, the amendment must be formulated, and counsel for the plaintiffs pointed out with force that the actual amendment sought to be made here only emerged yesterday morning when counsel for the defendants produced an affidavit to which it was exhibited. Counsel for the plaintiffs says that in these circumstances the course taken by the defendants in regard to the amendment in the court below was not strictly speaking such as to entitle them to appeal at all. He says that on the learned judge's refusal to grant the amendment counsel for the defendants ought to have insisted on an adjournment and insisted on the judge considering the precise form of amendment which would have been prepared during the adjournment. In my view that is really hypercritical. What actually happened in this case, as I understand it, was that the learned judge refused out of hand an application to make any amendment raising the question of value. I think it is really too much to expect of counsel in those circumstances that they should necessarily pursue the matter to the extent of insisting on an adjournment with a view to the amendment being formulated and with a view to the learned judge rejecting it, as indeed he had already refused any amendment of the kind sought when the point was first raised. Accordingly, I do not think that *Derrick v. Williams* (9) affords any obstacle to the defendants' claim. C D E

Lastly, as to the precise form of the amendment which was produced in accordance with counsel for the plaintiffs' submissions, that does make out, as I understand it, a case of value, and if the facts which are verified by affidavit are true, then *prima facie* (and, without seeking to prejudge the result in any manner at all, I merely say "*prima facie*"), it does appear that the defendants have serious and substantial grounds for claiming to be in the position of purchasers for value without notice of the proceeds of these two cheques. I will not go into the account of the transaction under which the cheques were paid given in the affidavit and in the proposed amendment of the defence, for I think that it is for the present purpose unnecessary. I think it does show that there is a substantial and serious ground for the plea of value, and I leave it at that; whether it will suffice or not remains to be seen, and all questions bearing on the question of value, and, indeed, every other question, are intended to be left entirely open so far as this judgment is concerned. F G

For the reasons which I have endeavoured to state, although this court is rightly slow to interfere with the discretion of a learned judge in such a matter, I think that the learned judge in this case did proceed on a wrong principle in refusing this application to amend out of hand, and I think that that way of dealing with the matter did involve a real injustice on the defendants, who were thus in effect deprived of the only defence left to them in the action once it was put as an action in which the personal liability in equity enunciated in *Ministry of Health v. Simpson* (1) ([1950] 2 All E.R. 1137) and in *Nelson v. Larholt* (2) ([1947] 2 All E.R. 751) was to be relied on; as far as I can see once that appeared the plea of purchaser for value became of vital importance. In my view this appeal should be allowed so far as it is an appeal against DANCKWERTS, J.'s refusal of the application to amend. The necessary consequence of that is that the order of DANCKWERTS, J., must be discharged and the case must go back for a new trial on the footing that the defendants are to be entitled to amend their H I

A defence in accordance with the proposed amendment exhibited to the affidavit of Mr. William Henry Pitts.

ROMER, L.J.: I agree, and if I add a very few words of my own, it is only because we are differing from the learned judge and because the position which has arisen seems to me to be a very unusual one. As the learned judge said, both the plaintiff company and the defendant company were innocent victims of the fraud of a man called Titley, who was the plaintiffs' auditor and was a director of the defendant company, and the question arises which of the two companies is to pay for his misdoing. It would be highly unsatisfactory that either of the innocent parties should have judgment entered against them for the considerable sum which is in question without having had an opportunity of presenting every defence on which they desire to rely and of having it considered and dealt with by the learned judge, for otherwise the unsuccessful party would not unnaturally think that he had not received justice and would feel that he was under a grievance. The defendants desired before the learned judge, and desire now, to amend their defence by pleading that they gave value for the cheques which they received from Titley, and they desired to introduce that as an additional defence to their other defences when the matter was before DANCKWERTS, J., but he refused to allow them to do so. I have a note of seven points on which counsel for the plaintiffs relied as showing that the learned judge was right in refusing them leave and that we should be wrong if we gave the defendants leave now. Having regard to the judgment which my Lord has just delivered, I need do little more than summarise the points on which counsel for the plaintiffs relied, and I do not take them necessarily in the order in which he mentioned them.

Counsel for the plaintiffs in the first place referred to certain correspondence which passed and he said that the letters showed that all the relevant facts and issues were known to the defendants long ago and that they should have pleaded them in their defence if they wanted to rely on them. It seems to me, however, that the answer to that is that the only function of a defence is to plead to allegations which are made in the statement of claim unless, which is not the case in the present proceedings, the defendants raise a counterclaim. I agree with my Lord that what has been for convenience referred to as the *Diplock* point* in the discussion before us, did not emerge from the statement of claim. My Lord has referred to this question in detail and I will not refer to it again, except to say that para. 3, which counsel for the plaintiffs said does really give birth to this *Diplock* point, does not appear to me to do anything of the kind. Paragraph 3 is an allegation of constructive trusteeship of the defendant company on the ground that they had notice of the fraudulent breach of trust by Titley. It does not seem to me that that would convey to anybody reading it that the plaintiffs were, apart altogether from any question of notice, relying on the *Diplock* point, and, accordingly, it was not necessary to plead value in answer to para. 3.

Then, says counsel for the plaintiffs, be that as it may, the statement of claim as a whole, including as it does a claim based on trading, would render it obviously desirable for the defence to raise the plea of purchaser for value without notice. I do not myself take that view, but in any case such a plea would be vital, on the assumption that counsel for the defendants is wrong on the main point on which he started to open the appeal, on the *Diplock* point and either irrelevant, or not really relevant, to the rest of the statement of claim as delivered.

Then the third point which counsel for the plaintiffs took was that the defence showed that the defendants still did possess the sums which they received from Titley. With regard to that I really have nothing to add to what my Lord has said. The judge did not read it in that way: I should not read it in that way, and if it is read in that way, then nothing whatever, so far as I can see, would be

* Stated at p. 543, letters A to C, ante; the decision in *Ministry of Health v. Simpson* (1) there cited, was a decision on an appeal to the HOUSE OF LORDS from part of what was decided by the COURT OF APPEAL in *Re Diplock's Estate* ([1948] 2 All E.R. 429).

left in the defendants' defence had they intended to admit that they still had in their hands the sums which they received in breach of trust from Titley. A

The fourth point was that when DANCKWERTS, J., refused leave to amend when junior counsel for the defendants asked for leave, they should have come straight to the Court of Appeal to appeal against that refusal. As to that I think that such a course would have been highly inconvenient and in my experience it would have been unusual. B

Then, says counsel for the plaintiffs, we are being asked to overrule a matter which is essentially one of discretion vested in the learned judge and to come to a conclusion which did not commend itself to him. I realise the weight of that, but, after all, to my mind, it is paramount that justice should be done between litigants and if justice can only be effected by disturbing the exercise of the discretion of the learned judge in such a matter as this, then it is the bounden duty of this court to give effect to the view they have formed themselves, as indeed was done in *Tildesley v. Harper* (6) ((1878), 10 Ch.D. 393), to which my Lord has referred. C

Then the sixth point to which counsel for the plaintiffs referred, which perhaps is more directed to costs, was that when junior counsel for the defendants made his application for leave to amend he ought to have produced before DANCKWERTS, J., a piece of paper on which was written the precise terms and form of the amendment which he desired to introduce into the defence, in accordance with what SIR WILFRID GREENE, M.R., stated to be a convenient practice in *Derrick v. Williams* (9) ([1939] 2 All E.R. 559). I cannot myself think that much would have come of that if counsel had adopted that course. The nature of the amendment that he desired to make was perfectly obvious in the context in which the application was made, and to think that he would have been any better off if he had asked for an adjournment to write it out and put it into exact form and bring the matter to the notice of the judge again, is to my mind unrealistic in the extreme. DANCKWERTS, J., knew perfectly well what the nature of the amendment was and he said that he was not prepared to admit it. As I say, I do not think counsel would have advanced the position in the slightest if he had produced the precise form of the proposed amendment. D

Then, finally, counsel for the plaintiffs said in relation to the amendment which was handed to us yesterday by counsel for the defendants and the affidavit which exhibited it, that in fact Mr. Pitts' affidavit showed no consideration by the company and that all that happened was that Titley at most made a loan to the defendant company. That obviously is not a matter which can be tried out now. I am quite satisfied that, whether or not the defendants will succeed in this case either on that point or on any other, Mr. Pitts' affidavit does at least show a *prima facie* question to try on the question of value, and inasmuch as I take that view, and there is no question of any want of bona fides on the part of the defendant company, I am clearly of the opinion that justice can only be done in this case by allowing the defendants to amend in the way they have indicated so that that defence and all the other defences may be brought fully to the attention of the judge, so that in the light of them he can finally decide which of these two unfortunate companies has to pay for the fraud of Titley. E

I agree, therefore, that the defendants should be allowed to amend and that the matter should be remitted for a re-hearing. F

WILLMER, L.J.: I agree that this appeal should be allowed for the reasons stated by my Lords, but as we are differing from the learned judge I will add a few words of my own. G

It is objected that we are being asked to overrule the learned judge's exercise of discretion, whereby he refused the application which was made to him for leave to amend the defence. That, of course, is a formidable argument, but it seems to me that the learned judge's ruling on the point is open to the objection that it offends against the principle enshrined in R.S.C., Ord. 28, r. 1, namely, that H

- A “all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties.”

B This is a case in which, if the plaintiffs were to have their way, we should have had to deal with this appeal on the basis of a hypothetical state of facts. Her Majesty's Courts exist for the determination of real disputes between real people, and not for the purpose of arriving at academic decisions on hypothetical facts. When counsel for the defendants started to open the appeal he frankly stated that, unless leave to amend the defence were granted, he would have to go on with the presentation of his argument on the basis of a hypothetical state of facts, as though a moot were being conducted at a university. That seems to me to offend against the principle, and I refer not only to the rule I have mentioned but also to the decision of this court in *Tildesley v. Harper* (6) ((1878), 10 Ch.D. 393), to which my Lord has already made reference. In that connexion perhaps I may stress the words used by THESIGER, L.J., in his judgment (*ibid.*, at p. 397), which I repeat:

- D “The object of these rules is to obtain a correct issue between the parties, and when an error has been made it is not intended that the party making the mistake should be mulcted in the loss of the trial.”

E The question before us relates to an allegation which the defendants now desire to make, namely, that they gave value for the cheques received from Titley. They did not make that allegation in the first instance when the defence was delivered because, as we were told, their advisers misapprehended the nature of the case which the plaintiffs eventually sought to make against them. There has been much discussion during the hearing of this appeal whether or not the defendants' advisers were justified in misapprehending the case that was to be made. As to that I do not wish to add anything to what my Lords have said, except this observation—and it is perhaps an observation which comes all the better from me as this is a branch of the law in which my experience in the past has not lain. It is quite clear that it is a rather obscure question which has been raised in this case, and one on which there is little authority. Indeed, as has been pointed out by my Lord, the learned judge's decision was ultimately based on a dictum of DENNING, J., in *Nelson v. Larholt* (2) ([1947] 2 All E.R. 751), a dictum which, it has been properly pointed out to us, was not in fact necessary for the decision of that case. It occurs to me that the very fact of the obscurity of the point at issue makes it all the more necessary that the issues of fact should be clearly defined in the pleadings, so that the court may have every opportunity of ascertaining the real facts and applying its judgment to a real state of facts. Quite clearly if the defendants are allowed to amend, and can prove that they gave value for the cheques received from Titley, the case will necessarily wear a very different complexion from that which it had as decided by the learned judge. Indeed, the main part of the learned judge's judgment—and by that I wish to be understood as excluding so much of his judgment as dealt with the statute of limitations—may turn out to be quite irrelevant to the real facts of the case. If, on the other hand, the defendants fail to prove that they gave value for the cheques received, then we may get back to the position which has already been reached; but until the real facts have been ascertained, we are in the realms of hypothesis.

- I I should like to add this, and I do so without wishing to be thought to be in any way expressing any view as to the merits of the dispute which has emerged: for myself I find it difficult to treat this question of giving value for the cheques in isolation from the other question, which was clearly raised on the pleadings, whether or not the defendants had notice of the fraud and breach of trust on the part of Titley. If the defendants in the event fail to prove that they gave value for the cheques, the position would be that they, a trading corporation, had received a wholly unexplained gift of a very considerable sum of money from one

of their own directors, since we have been told Titley was a director of the defendant company. I should have thought, if such a state of facts emerged, namely, the receipt of such a large sum of money without showing that any value was given for it, that would be at least sufficient to have put the defendants on inquiry whether Titley was really acting bona fide or not; and that in turn must, I should have thought, be relevant to the issue whether the defendants did or did not have notice of Titley's fraud and breach of trust. I mention that because counsel for the plaintiffs told us that, having regard to the way the trial proceeded before the learned judge, he abandoned his allegation that the defendants had notice of the breach of trust. It seems to me quite clear, and this was readily acceded to by counsel for the defendants, that if this case is to go back for a new trial, all points must be open to the parties; in particular, it would be wrong to hold the plaintiffs to their counsel's abandonment of the point that the defendants had notice of the fraud. That point should, in my judgment, be fully open to the plaintiffs if on the fresh trial they desire to take it.

There is one other matter with which I wish to deal quite briefly, and that is with regard to the formulation of the amendment which it has been sought to make. I agree with what my Lords have said with regard to the failure to reduce the proposed amendment to writing at the trial. Having regard to the way in which the matter was dealt with at the trial, I apprehend it would have been a useless formality merely to write out on a piece of paper that which the learned judge had already refused to allow. When the case was to come to this court, however, it seems to me that different considerations applied. I venture to refer to the provisions of the rules governing appeals which will, I think, be seen to justify what I have to say. R.S.C., Ord. 58, r. 3 (2), says:

"Notice of appeal may be given either in respect of the whole or in respect of any specified part of the judgment or order of the court below; and every such notice shall specify the grounds of the appeal and the precise form of the order which the appellant proposes to ask the Court of Appeal to make."

It occurs to me that if the defendants proposed to ask the Court of Appeal for leave to amend their pleading, the provisions of that rule necessitated that the proposed amendment to the pleading should be formulated in the notice of appeal. That was not done in this case, and, indeed, the proposed amendment was only reduced to writing and handed to us yesterday. I venture to raise that point because this is a rule which is of comparatively recent origin, and it may be that its implications have not yet been fully appreciated. Whether or not it is of significance in this case is a matter which I think the parties should have an opportunity of arguing, in so far as it concerns the question of costs.

Appeal allowed, order of DANCKWERTS, J., discharged, the matter referred back to chambers, either side being at liberty to amend their pleadings as they might be advised. Costs up to and including the hearing below reserved to the judge at the new trial. One half of the appellants' costs of the appeal to be paid by the respondents. Leave to appeal to the House of Lords refused.

Solicitors: *Alfred Neale & Co.* (for the defendants); *Bell & Ackroyd* (for the plaintiffs).

[Reported by HENRY SUMMERFIELD, ESQ., Barrister-at-Law.]

DINIZULU v. ATTORNEY-GENERAL AND REGISTRAR-GENERAL.

[QUEEN'S BENCH DIVISION (Paull, J.), October 21, 23, 24, 27, 28, 1958.]

Marriage—Registration—Bigamous marriage—Correction of register—Whether mandamus to correct register lies—Marriage Act, 1836 (6 & 7 Will. 4 c. 85), s. 23—Marriage Act, 1949 (12, 13 & 14 Geo. 6 c. 76), s. 61.

D. went through a ceremony of marriage at Holborn Register Office on Jan. 16, 1941, which was bigamous and therefore invalid. It was entered in the register of marriages. D. claimed a mandamus against the Registrar-General directing him to correct or erase the entry in the register of marriages.

Held: mandamus would not be granted because (i) the entry of marriage in the register was not made *ultra vires*, as the word "marriage" in s. 23 of the Marriage Act, 1836, extended to a ceremony of marriage although the marriage was void by reason of the husband of one of the parties being alive, and (ii) the power under s. 61 of the Marriage Act, 1949, to correct entries in the register did not enable the entry to be expunged or a note to be made to it that the marriage was void.

[**Editorial Note.** Section 23 of the Marriage Act, 1836, has been repealed by the Marriage Act, 1949, which does not contain any enactment reproducing the provisions of s. 23 exactly; but the substance of much of s. 23 is comprised in s. 55 of the Act of 1949, to which it seems that this decision would be applicable as authority that it is the ceremony of marriage rather than the legal bond that is the subject of registration.

As to the registration of marriages solemnised in the presence of registrars, see 28 HALSBURY'S LAWS (2nd Edn.) 151, para. 289; and as to the correction of errors, see *ibid.*, p. 138, para. 268.

For the Marriage Act, 1836, s. 20 and s. 23, see 11 HALSBURY'S STATUTES (2nd Edn.) 718 and 719; and for the Marriage Act, 1949, s. 61, see 28 HALSBURY'S STATUTES (2nd Edn.) 704.]

Action.

The plaintiff, Princess Alexandria Albertina Palmer Dinizulu, claimed damages against the Attorney-General for negligence and a mandamus against the Registrar-General, directing him to correct or erase an entry in the register of marriages at Somerset House or elsewhere. This report relates only to the proceedings against the Registrar-General. The plaintiff, who was a British subject, born in Zululand, married a French subject, a Senegalese, in Marseilles in 1939 but did not thereby acquire French nationality. She came to this country in August, 1939, and was unable to return to her husband in France owing to the outbreak of war. On Jan. 16, 1941, she went through a ceremony of marriage* with a Polish subject at the Holborn Register Office, while her previous marriage was subsisting. She now applied to have the registration of this ceremony expunged on the ground that as there was a lawful impediment to the marriage, it could not be solemnised and therefore the Registrar-General was acting *ultra vires* in registering it. For the defendant it was argued that what has to be registered is the marriage ceremony, even if the marriage is null and void.

W. T. Wells, Q.C., F. M. Drake and Roland Brown for the plaintiff.

G. D. Roberts, Q.C., Rodger Winn and J. G. Hull for the defendants.

* Of this His Lordship observed " . . . I think she was grossly deceived by the person or persons who persuaded her to go through the ceremony of marriage for the purpose of obtaining money from her. [She had apparently agreed to pay £500 to be transported out of England.] I think that she went through that ceremony solely because in the 'blitz' which was then taking place she was terrified, her only desire being to leave this country and try to rejoin her husband, or, at least, to find out whether her husband was in unoccupied France. That is a picture very different from the usual picture of a woman going through a bigamous form of marriage."

PAULL, J.: There has been an interesting argument on the right to grant a mandamus against the Registrar-General to correct or to erase the entry in the marriage register. It is said, on behalf of the plaintiff, that the only power to make an entry in the register is contained in the provisions of the Marriage Act, 1836. By s. 20 of that Act, a marriage may only be solemnised provided there is no lawful impediment to the marriage. Here, it is said, that there was a lawful impediment and, therefore, no marriage was in fact solemnised. By s. 23, the registrar is only authorised to register all marriages solemnised. The plaintiff's counsel says, therefore, that the Registrar-General was acting *ultra vires* when he made the entry on Jan. 16, 1941, and that that is not affected by the fact that he was acting in perfect good faith. It is contended, therefore, that there is a power in the court to order the erasure of the entry as an act done beyond the powers of the Registrar-General, and that the court ought to exercise its power to order a mandamus since the act of the Registrar-General was *ultra vires*.

It is pointed out, however, by counsel for the defendants that in earlier Acts of Parliament the words "married" and "marriage" are used where a ceremony of marriage has taken place which is afterwards declared void. Thus, in the Marriage of Lunatics Act, 1811, it is declared that, if a lunatic shall marry, the marriage is null and void. The words are "shall marry" and not "shall go through a ceremony of marriage". Similarly, s. 22 of the Marriage Act, 1823, provides that where persons intermarry in other than authorised buildings or acquiesce in the solemnisation of marriage by persons not in holy orders such marriages shall be void. It follows, says counsel for the defendants, that the word "marriage" in s. 23 of the Marriage Act, 1836, covers ceremonies of marriage even if the "marriage" is one which is null and void because the husband of one of the parties is still alive.

In my judgment, this argument prevails. I cannot think that the registrar was acting *ultra vires* in making the entry in the register unless he knew that there was an impediment to the marriage, and there was no suggestion of that fact.

The next argument was that I ought to grant a mandamus ordering the Registrar-General to correct the entry by either striking it out or making an entry in the margin deleting the condition and stating that one of the parties was already married to another person. I was referred to s. 61 of the Marriage Act, 1949, and certain regulations made under that Act. Section 61 is the only section giving the Registrar-General power to correct entries. I hold that the words in that section which give the power to correct an error in the form or substance of the entry may cover a mistake in the conditions—I make no decision as to that—but do not cover a situation where a party wants to strike out the entry altogether, or to make a note in the margin that the marriage was a void marriage.

With regard to the argument as to correcting the register, in any event a mandamus is a discretionary remedy, and I should not exercise my discretion in favour of the plaintiff in this case on the question of correcting the entry since she, herself, clearly consented to that entry being made.

That means that the action as framed fails.

Order for mandamus refused.

Solicitors: *Spector & Spector* (for the plaintiff); *Treasury Solicitor* (for the defendants).

[Reported by E. COCKBURN MILLAR, Barrister-at-Law.]

A

WOODWARD v. KOESSLER.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Donovan and Ashworth, JJ.), July 30, 1958.]

Criminal Law—Prevention of crime—Carrying offensive weapons without lawful authority or excuse—Boy's sheath knife—Knife taken out by accused to break into cinema—Used to intimidate caretaker—Whether accused had with him an article intended for use for causing injury—Prevention of Crime Act, 1953 (1 & 2 Eliz. 2 c. 14), s. 1 (1), (4).

B

C

"Causing injury to the person" for the purpose of s. 1 (4) of the Prevention of Crime Act, 1953*, includes frightening or intimidating a person. To ascertain whether an accused "had with him" within s. 1 (1) an "article intended by [him] for use for causing injury to the person" within s. 1 (4), the court has regard to the use that was in fact made of the article, and it is not necessary to prove that the article was taken out by the accused for the purpose of causing injury to a person if he uses it for that purpose while he is out with it.

D

While the accused was trying to break into a cinema by forcing open the door with a sheath knife, the caretaker came along. The accused went up to the caretaker, holding the knife in a threatening attitude as if to strike with it, and said "Can you see this?"

E

Held: the accused was guilty of an offence against s. 1 (1) because he had with him a knife and at the time when he went up to the caretaker his conduct showed an intention to use the knife for causing injury to the person of the caretaker.

Observations by LORD GODDARD, C.J., as to the desirability of cases being stated quickly (see p. 558, letters F and G, post).

Appeal allowed.

F

[As to carrying offensive weapons, see 10 HALSBURY'S LAWS (3rd Edn.) 583, para. 1084; as to proof of criminal intention, see *ibid.* 282, para. 522.

For the Prevention of Crime Act, 1953, s. 1, see 33 HALSBURY'S STATUTES (2nd Edn.) 34.]

Case Stated.

G

The prosecutor appealed by Case Stated from the decision of the Reading Borough justices dismissing a charge under the Prevention of Crime Act, 1953, s. 1, against the accused. The facts, which are summarised in the headnote, are set out in the judgment of LORD GODDARD, C.J.

Victor Durand, Q.C., and *G. H. Rountree* for the prosecutor.

A. J. D. McCowan for the accused.

H

LORD GODDARD, C.J.: This a Case Stated by justices for the County Borough of Reading, before whom one Andrew John Koessler was charged that he without lawful authority or reasonable excuse had with him in a public place, called Thorn Street, an offensive weapon, namely, a sheath knife, contrary to s. 1 of the Prevention of Crime Act, 1953. Notwithstanding a well-sustained argument by counsel for the accused the justices came, in my opinion, to a wrong decision for reasons which I will endeavour to give quite shortly.

I

The accused with some other young scamps tried to break into a cinema, the Odeon at Reading. They were trying to do this with an iron bar and a knife. I am told that it is the sort of knife which scouts use, but it was a sheath knife—

* The Prevention of Crime Act, 1953, s. 1 provides, so far as relevant: "(1) Any person who without lawful authority or reasonable excuse, the proof whereof shall lie on him, has with him in any public place any offensive weapon shall be guilty of an offence . . .

"(4) In this section . . . 'offensive weapon' means any article made or adapted for use for causing injury to the person, or intended by the person having it with him for such use by him."

a thing very much like a dagger. When the elderly caretaker came to the door the accused, holding the knife, which was then out of its sheath and which he had been using while endeavouring to force the door, went up to the man in a threatening attitude as if to strike with it and said to him—"Can you see this?" The justices came to the conclusion that the accused was not carrying an offensive weapon. Their reason apparently was that the words of the definition are rather obscure. By s. 1 (4) of the Prevention of Crime Act, 1953:

" 'offensive weapon' means any article made or adapted for use for causing injury to the person, or intended by the person having it with him for such use by him."

It could be said that the sheath knife was not made for the purpose of causing injury, though I do not know what other use these sheath knives or flick knives have; but assuming that it is like a razor, made primarily for the purpose of shaving and not for the purpose of causing injury, where I think that the justices have gone wrong is in holding that, when the accused said that he did not intend to cause injury, that statement was conclusive. The justices have taken much too narrow a view of the words "causes injury", because the accused obviously did intend to cause injury; frightening a person or intimidating a person is causing injury. If we were to hold that this young man with this shocking weapon was not in possession of an offensive weapon for causing injury, when he went up to an elderly man and said "Can you see this?", it would be driving a coach and four through this useful Act. It would hardly ever be possible to get a conviction. We know well why it is rather an obscure definition, viz., because one of the weapons that these young hooligans like to use is a bicycle chain. The bicycle chain is not made for injury, but if a boy is swinging a bicycle chain and saying "Look out", that is using an offensive weapon.

In my opinion this appeal must be allowed and the Case Stated must go back to the justices with an intimation that the offence was proved and a reminder to the accused that there are such places as detention centres.

As this is the last case which we shall be trying in these sittings, I should like to say that we wish those who have the power of making rules could find some way of speeding up the stating of cases. This case was before the justices so long ago as Mar. 20. The offence was committed on Feb. 18, and it has been hanging over the accused until now. I am not thinking of him, but it would be much better that these cases should be disposed of quickly. The decision of the justices was given on Mar. 20, so that they had until June 20 in which to state a case, and, though I am not blaming anybody, I should think that this case could have been stated within a week of the hearing if anybody had sat down to it—then the case would have been heard last sittings.

DONOVAN, J.: I agree. Counsel for the accused founds himself on the words "having it with him", and says that the accused must be found to have taken the weapon out with him with the intention of causing injury. Counsel says that in this case the accused took it for the purpose of breaking into the cinema. I do not agree with that narrow interpretation of the words "having it with him". All that one has to do for the purpose of ascertaining what the intention is is to look and see what use was in fact made of it. If it is found that the accused did in fact make use of it for the purpose of causing injury he had it with him for that purpose. I think that the evidence shows that the accused in this case did have it with him for the purpose of causing injury. I may add that after he was taken into custody he handed the knife, unseen, to one of his companions, so that when he was searched it would not be found on him. One

A wonders why, if he knew it was not for causing injury, he threatened the care-taker with it saying—"Can you see this?"

ASHWORTH, J.: I agree with both judgments which have been delivered.

Appeal allowed.

B Solicitors: *Sharpe, Pritchard & Co.*, agents for *G. F. Darlow*, Reading (for the prosecutor); *Dennis Berry & Co.*, Reading (for the accused).

[Reported by HENRY SUMMERFIELD, ESQ., Barrister-at-Law.]

NOTE.

D R. v. OLDHAM JUSTICES, *Ex parte* MORRISSEY.

[QUEEN'S BENCH DIVISION (Lord Parker, C.J., Streatfeild and Diplock, JJ.), October 22, 1958.]

E Magistrates—*Plea of guilty in absence of accused—Written submission by accused with view to mitigation of sentence—Necessity for submission to be read out in court before accused convicted in his absence—Magistrates' Courts Act, 1957 (5 & 6 Eliz. 2 c. 29), s. 1 (2), proviso (ii).*

[As to the acceptance of a plea of guilty in the absence of the accused, see 25 HALSBURY'S LAWS (3rd Edn.) 197, para. 359, particularly note (e).

For the Magistrates' Courts Act, 1957, s. 1 (2), see 37 HALSBURY'S STATUTES (2nd Edn.) 627.]

Motion for an order of certiorari.

This was a motion for an order of certiorari* to remove into the High Court and quash a conviction and sentence on the applicant, C. D. Morrissey, by the justices for the County Borough of Oldham, sitting as a magistrates' court. The offence with which the applicant was charged was a parking offence.

G The ground of the application was that the justices had no jurisdiction to convict

* This case may be contrasted with *R. v. Davis, Ex p. Brough*, heard on May 8, 1958, in which the Divisional Court (LORD GODDARD, C.J., CASSELS and DIPLOCK, JJ.) dismissed an application for an order of certiorari to remove into the High Court and quash an order made by the magistrate at Clerkenwell Police Court on Mar. 12, 1958, whereby the applicant was convicted of causing an obstruction with a motor car and was fined £1. The applicant, on being served with the summons, sent a notification in writing that he desired to plead guilty and a submission which he wished to be brought to the attention of the court with a view to mitigation of sentence. At the hearing of the information, he was present in a public part of the court room but was not called on to appear. On the motion for certiorari, it was submitted on his behalf that his submission in mitigation was not read out before the court, as required by proviso (ii) to s. 1 (2) of the Magistrates' Courts Act, 1957.

I In his judgment, LORD GODDARD, C.J., said that the applicant was in court throughout the hearing of the information, and, if he thought that the mitigating circumstances were not brought before the court or that his submission was not being read out as fully as he desired, he could have said so. After stating that he had not the least doubt that the mitigating circumstances were read out, in substance at any rate, HIS LORDSHIP said: "I do not want anything that I say to give the idea that the proceedings laid down by the statute should not be strictly followed. I think that they should be. In the present case, however, I am not prepared to find as a fact that the submission which the applicant sent in was not read out in open court." CASSELS and DIPLOCK, JJ., concurred.

or sentence the applicant because proviso (ii) to s. 1 (2) of the Magistrates' Courts Act, 1957*, had not been complied with. A

A. J. Irvine, Q.C., and *Cecil Binney* for the applicant.

The respondents did not appear and were not represented.

LORD PARKER, C.J.: The grounds on which this application is made are that the magistrates had no jurisdiction to convict or to sentence having regard to the fact that the conditions of s. 1 of the Magistrates' Courts Act, 1957, were not fulfilled. Section 1 of that Act provides machinery whereby, in the case of certain minor offences, the accused need not attend the court but can, in effect, send in a plea of guilty. The magistrates have power, on considering the notice put in by him, to decide whether they can treat it as a plea of guilty and convict or whether the matter is of a serious nature and should be adjourned for the accused to appear. There is one important condition precedent to the exercise of their jurisdiction under this section, which is provided in proviso (ii) to sub-s. (2) in the following terms: B C

"before accepting the plea of guilty and convicting the accused in his absence under this sub-section, the court shall cause the notification and statement of facts aforesaid, including any submission received with the notification which the accused wishes to be brought to the attention of the court with a view to mitigation of sentence, to be read out before the court." D

In this case, the applicant put in a written statement in mitigation. It is conceded by the magistrates' clerk that the letter was not read out in court, though he states that it was handed to the magistrates and that to the best of his knowledge the magistrates had full knowledge of it. We all know that these matters have to be dealt with expeditiously, and on this particular day there was a great number of cases to be heard. It seems to me, however, to be quite clear that, before the magistrates can exercise jurisdiction in a case of this sort, they must strictly observe the conditions of the statute. Mere knowledge of the contents of the accused's submission, the mere reading of it to themselves, is not sufficient; the submission must be read out in open court. That being so, the magistrates had no jurisdiction to convict or to pass sentence in this case, and the order of certiorari must go. E F

STREATFEILD, J.: I agree.

DIPLOCK, J.: I also agree.

Order of certiorari granted.

Solicitors: *Amery-Parkes & Co.* (for the applicant).

[Reported by G. A. KIDNER, Esq., Barrister-at-Law.] G

* Section 1 of the Magistrates' Courts Act, 1957, so far as relevant, provides: "(1) . . . this section shall apply where a summons has been issued requiring a person to appear before a magistrates' court . . . to answer to an information for a summary offence [certain offences are then excluded] and the clerk of the court is notified by or on behalf of the prosecutor that the following documents have been served upon the accused with the summons, that is to say . . . (ii) a concise statement in the prescribed form of such facts relating to the charge as will be placed before the court by or on behalf of the prosecutor if the accused pleads guilty without appearing before the court. H

"(2) Where the clerk of the court receives a notification in writing purporting to be given by the accused or by a solicitor acting on his behalf that the accused desires to plead guilty without appearing before the court [here certain requirements are stated and, if these are satisfied, then]—(a) the court may proceed to hear and dispose of the case in the absence of the accused, whether or not the prosecutor is also absent, in like manner as if both parties had appeared and the accused had pleaded guilty; or (b) if the court decides not to proceed as aforesaid, the court shall adjourn or further adjourn the trial for the purpose of dealing with the information as if the notification aforesaid had not been given: Provided that . . . (ii) before accepting the plea of guilty and convicting the accused in his absence under this sub-section, the court shall cause the notification and statement of facts aforesaid, including any submission received with the notification which the accused wishes to be brought to the attention of the court with a view to mitigation of sentence, to be read out before the court . . ." I

EWART v. EWART.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P.), October 29, 1958.]

Husband and Wife—Maintenance—Agreement—Variation by court—Jurisdiction—Permanent or continuing financial provisions but agreement not made for the purposes of living separately—Maintenance Agreements Act, 1957 (5 & 6 Eliz. 2 c. 35), s. 1 (1), (3).

The parties were married in 1931, and in 1953 the wife discovered that the husband had been carrying on an adulterous association with another woman. A reconciliation at the husband's instance was agreed on terms which included financial arrangements, and these were subsequently incorporated in a deed dated May 1, 1954. The deed did not provide either for the resumption of cohabitation or for separation; it included covenants by the husband to make payments during the joint lives of himself and the wife and to leave her property by his will. The parties resumed cohabitation and lived together until August, 1956, when the husband left the matrimonial home. The husband now applied to the court to vary the financial arrangements made by the deed, alleging that under the Maintenance Agreements Act, 1957, s. 1, which by sub-s. (1) applied to any agreement in writing between the parties to a marriage "for the purposes of their living separately", there was jurisdiction under sub-s. (3) to vary the deed.

Held: the court had no jurisdiction under s. 1 of the Maintenance Agreements Act, 1957, to vary the deed since, notwithstanding the continuance or permanence of the financial provisions made by it, it had not in fact been made for the purposes of the parties living separately within the meaning of s. 1 (1).

[As to variation of agreements made between parties to a marriage for the purpose of their living separately, see 19 HALSBURY'S LAWS (3rd Edn.) 889, para. 1470, text and note (i).

For the Maintenance Agreements Act, 1957, s. 1, see 37 HALSBURY'S STATUTES (2nd Edn.) 495.]

Cases referred to:

- (1) *Balfour v. Balfour*, [1919] 2 K.B. 571; 88 L.J.K.B. 1054; 121 L.T. 346; 27 Digest (Repl.) 201, 1604.
- (2) *Re Meyrick's Settlement*, *Meyrick v. Meyrick*, [1921] 1 Ch. 311; 90 L.J.Ch. 152; 124 L.T. 531; 27 Digest (Repl.) 218, 1733.
- (3) *Lurie v. Lurie*, [1938] 3 All E.R. 156; 107 L.J.Ch. 289; 159 L.T. 249; 27 Digest (Repl.) 218, 1734.

Summons.

This was a husband's application, by originating summons, under the Maintenance Agreements Act, 1957, s. 1 (1) (a), claiming that an agreement made by deed between himself and the wife on May 1, 1954, containing financial arrangements should be altered so as to make different financial arrangements. The hearing took place in chambers but the summons was adjourned into open court for judgment. The facts appear in the judgment of LORD MERRIMAN, P.

J. Jackson for the husband.

K. B. Campbell for the wife.

Cur. adv. vult.

Oct. 29. LORD MERRIMAN, P., read the following judgment: At the first hearing on affidavit evidence each counsel claimed the right to cross-examine the other deponent, and counsel agreed, and indeed insisted, that in the absence of any express declaration on the face of the deed it was necessary to go into the

circumstances in which the deed itself was made in order to ascertain whether or no the agreement was made "for the purposes of [the parties] living separately", so as to bring it within the scope of the Maintenance Agreements Act, 1957. The originating summons was heard in chambers throughout; but as this was said to be the first case under the Maintenance Agreements Act, 1957, and to raise a question of jurisdiction, I have adjourned the giving of my judgment into open court. A

The husband puts forward certain alleged changes in the circumstances, in the light of which the original agreement was made. But the wife asserts that the provisions of the deed in question do not come within the Act at all, and it is to this point that the evidence and the arguments have been directed—for, unless the Act of 1957 applies, it is common ground that I have no jurisdiction, in the circumstances of this case, to reform the terms of this particular deed; and, therefore, there is no object in considering the alleged change of circumstances unless the court is satisfied that the Act applies. It is now common ground that the agreement is not in form a separation agreement, but it is the husband's contention that its terms are consistent with its being designed to govern a separation, and do so by necessary implication. B

The circumstances leading up to the deed may be outlined as follows: The parties were married on Aug. 28, 1931. About the end of November or early December, 1953, the husband had an illness. When he was lying in bed at the matrimonial home the wife accidentally intercepted a telephone conversation between the husband and a woman with whom, admittedly without the wife's knowledge, he had been committing adultery for some five years, and who had recently had a child of which he was the father. After a futile attempt by the husband to pretend that the conversation related to some man other than himself, he was forced to admit this association, which was plainly a very great shock to the wife. She consulted her solicitors, and there is no doubt that she contemplated divorce proceedings. It happened that the husband had just obtained new employment, which he thought would be jeopardised by the scandal of divorce proceedings, and I find as a fact, as is now admitted by his counsel, that he begged to be forgiven, and was fully cognisant of the outline of the terms on which the reconciliation should be effected. C

This view of the matter is supported by a letter from the husband's then solicitors to the wife's solicitors, dated Dec. 21, 1953, in which they say that it is unnecessary for them to send the return of the husband's income for the year 1952-53 because they have heard from him that his wife has agreed to resume married life with him on certain terms which are set out in the letter. It is unnecessary to quote them from the letter as the final version of the terms is comprised in the deed itself. D

The deed is made between the husband of the first part, the wife of the second part, and two trustees for the wife, who were in fact members of her solicitor's firm. It describes both the husband and the wife as being of Astrope Folly, Puttenham, near Tring in the county of Hertford. This was a house that had been built for them about 1948, in which they had lived together until the discovery of the husband's association already mentioned. The letter referred to stipulated that the house and the adjacent land should be transferred to the wife, and that the contents should be likewise transferred. The deed recites a conveyance of the freehold land and premises known as Astrope Folly by deed of Feb. 18, 1954, to the wife in fee simple for her own use and benefit absolutely, subject only as therein mentioned. It is only necessary to mention that this reservation refers to an equitable mortgage by deposit of the title deeds for the sum of £3,000 due to the husband and his sister as the trustees of the trust created by their father's will. The deed also recites that on the same day the husband delivered to the wife manually the whole of the furniture and effects then in or about Astrope Folly aforesaid, to hold the same for her own use and benefit absolutely. E

A There follows a recital that the husband being desirous of making further amends to the wife, and of providing for her both before and after his death, has agreed to enter into the covenants thereafter contained. Shortly, they are as follows:

B “(a) That the husband will . . . pay all expenses now or hereafter arising in connexion with . . . Astrope Folly . . . and will at his own expense keep the said property in good and substantial repair and condition and pay all fire insurance premiums and mortgage interest payable in respect of the said property and the equitable charge thereon;

C “(b) That the husband will forthwith execute a proper will . . . giving the whole of his estate both real and personal whatsoever and wheresoever situate to the wife for her own use and benefit absolutely and that such will . . . shall not be revoked or altered by the husband during the joint lives of the husband and wife.”

In fact a will to this effect had already been executed in 1952. The covenants continue:

D “(c) That the husband will pay to the wife on the first day of every month during [their] joint lives a sum reasonably sufficient for her support and maintenance and for the payment of household expenses of the kind hitherto usually paid by the wife out of moneys provided by the husband for such purpose, such sum in any event not to be less than £28 per month

E . . .
“(d) That the husband (in addition to the sums hereinbefore mentioned) will pay to the trustees during the joint lives of the husband and the wife such sums (hereinafter called ‘the wife’s personal allowance’) as after deduction therefrom of income tax . . . and surtax (if any) will amount to the clear sum of £41 13s. 4d. per month [i.e. £500 a year]:

F “(e) That the husband will pay all household and other expenses not payable by the wife out of the monthly sum mentioned in cl. 1 (c);

“(f) That the husband will also pay all legal costs, charges, fees . . . incurred by the wife in connexion with her matrimonial affairs including the preparation and completion of this agreement and documents incidental thereto and the recited conveyance;

G “(g) That the husband will at the request of the wife or the trustees and at his own expense forthwith execute and do all such instruments acts and things as the trustees or the wife may respectively require of him for the purpose of fully and effectually carrying out the terms of this agreement.”

In consideration of the husband’s covenants the wife covenants:

H “(a) That the wife will not so long as the husband shall observe and perform his covenants . . . at any time hereafter take any proceedings against the husband in respect of any misconduct or alleged misconduct committed or alleged to have been committed prior to the date [of the deed];

I “(b) That the wife will so long as the husband observes and performs his covenants . . . keep the husband indemnified against all debts and liabilities hereafter contracted or incurred by her, and will . . . support and maintain herself and will not pledge the husband’s credit;

“(c) That the wife will pay such household expenses as are described in cl. 1 (c) hereof out of the moneys in that behalf hereinbefore covenanted to be paid by the husband.”

By cl. 5 it was mutually agreed

“(a) That if owing to ill-health, retirement or some other extenuating circumstances which the trustees shall consider to be beyond the husband’s control, the husband shall satisfy the trustees that his means have so

materially depreciated that he is unable to continue to pay in full the moneys . . . covenanted to be paid under cl. 1 (d) . . . the wife will accept in lieu of the moneys so payable an annual sum which the trustees shall decide from time to time as being equal to one-third of the husband's total annual income (without deduction except for income tax), or, alternatively, a sum equivalent to the annual income received or due to the husband under [his father's] will . . . whichever shall be the greater amount."

The husband, so far, has not produced the figures required by the trustees for this purpose.

It will be noticed that there is no express provision in the deed for a resumption of cohabitation. In fact, as the letter of Dec. 21, 1953, shows, the wife had then already agreed to resume married life. I am satisfied that they had actually done so, and I accept the wife's evidence that they went together to spend Christmas with her relations at Bournemouth. Thereafter I find that except for a period of about ten weeks in or about April, 1955, when the wife was absent in Canada, they lived together at Astrope Folly until August, 1956, when the husband returned to the woman the association with whom had been the cause of the temporary separation. The husband, in accordance with his affidavit of June 17, 1958, tried to persuade me in evidence that the background to the deed was what he called "a separation basis", and he pointed to the fact that he had given instructions to his accountants to negotiate with the Inland Revenue authorities on this basis.

I will deal with the oral evidence shortly. [His LORDSHIP referred to the correspondence and reviewed the oral evidence of the husband and continued:] Counsel for the husband admitted at the conclusion of the evidence that on the facts he could not argue that the deed was made for the purposes of separation. He argued, however, that as a matter of law the agreement must be construed as being made for the purposes of the parties to a marriage living separately. This was put in two ways. First, starting with the premise that courts are not concerned with the financial arrangements of spouses living together (*Balfour v. Balfour* (1), [1919] 2 K.B. 571), it was argued that the court should construe the statute as applying only to agreements which were not hitherto against public policy. Therefore where the court has a choice whether to include or to exclude an agreement hitherto against public policy, then, unless the words of the statute are compelling, the court should construe it so as to include only such agreements as are not void as having hitherto been regarded as against public policy, such as agreements for future separation by spouses living together. Admitting that a provision contemplating future separation of spouses in a deed executed by them while living apart with the object and result of bringing them together as man and wife is not void on the ground of public policy—see *Re Meyrick's Settlement*, *Meyrick v. Meyrick* (2) ([1921] 1 Ch. 311) and *Lurie v. Lurie* (3) ([1938] 3 All E.R. 156)—the court ought to decline to take cognisance of the agreement so far as it relates to the regulation of financial arrangements between spouses while living together, or, if it recognises the reconciliation agreement at all, to do so on the basis that it impliedly regulates the financial provision in the event of a second breakdown, and therefore is made for the purposes of the parties living separately. I am not impressed by this argument. I do not think that I am entitled to cut down the plain words of the statute in this artificial manner. In other words, the court in face of the plain words of the statute is not concerned with questions of public policy which are said to have prevailed before it was passed.

Secondly, the argument was put in a somewhat simpler form: namely, that where a husband and wife make a financial agreement which contemplates their living together in a state of reconciliation, the court will always infer, whether it is so expressed or not, that the agreement is intended to operate, even if the

A reconciliation should not endure. Every reconciliation, it was said, contains the seeds of a breakdown, and therefore an agreement like the present one should be looked at, not as governing only the period of reconciliation, but also as covering the event of the reconciliation not enduring. It was pointed out that in s. 1 (6) (a), defining the expression "financial agreements", the words "provisions governing the rights and liabilities towards one another when living separately" are apt to apply to a separation arising later on the breakdown of the contemplated reconciliation, thus bringing the agreement within the Act, even though it was made while the parties were living together, and says nothing whatever about separation. Moreover, it was pointed out that the financial provisions themselves being either absolute as in the case of the conveyance of Astrope Folly, and the will made in the wife's favour, or for the joint lives, as in the case of the monetary provisions, are themselves apt to be applied if a state of separation supervenes.

In my opinion this argument is altogether too wide. What I am really asked to hold is that because an agreement granting a life interest, and a fortiori one making an out and out provision, governs the rights and liabilities towards one another of the parties to it, at least during their joint lives, and because the event of the parties living separately is an event which may occur during their joint lives, any such agreement is one governing the rights and liabilities towards one another when living separately, and is made, therefore, for the purposes of their living separately. This seems to me to make the duration of the agreed provision rather than the purpose or object with which the agreement is made the test of the applicability of the Act. In other words, it is contended that any eventuality, come what may, which can occur in the joint lives must necessarily be held to be a purpose of the agreement. One would, for example, be obliged to say that a life interest given to a wife by a post-nuptial settlement was a provision governing their rights and liabilities when living separately. Counsel for the husband did not shrink from accepting this illustration of his contention, and it is probably unprofitable to search for other examples.

In my opinion this interpretation makes nonsense of the terms of the Act. I find as a fact, and so hold, that the deed was made for the purposes of resuming cohabitation, and not otherwise, and that it was not made for the purposes of the spouses living separately. It was, in fact, intended, if possible, to prevent a repetition of the separation. In my judgment the originating summons fails for lack of jurisdiction and must be dismissed.

Order accordingly.

Solicitors: *M. A. Jacobs & Sons* (for the husband); *Cardew-Smith & Ross* (for the wife).

[*Reported by A. T. HOOLAHAN, ESQ., Barrister-at-Law.*]

AUTEN *v.* RAYNER AND OTHERS.

[COURT OF APPEAL (Lord Evershed, M.R., Sellers and Pearce, L.J.J.), October 20, 21, 22, 23, November 4, 1958.]

Discovery—Production of documents—Privilege—Production contrary to public interest—Bias of Minister—Police records—Fraud against police officer alleged—Certificate of Minister of Crown that production would not be in public interest—Remote personal and business relationship of Minister to defendant—Finality of certificate.

The plaintiff brought an action charging the defendants, of whom the third was a police officer, with conspiracy to injure and defraud him, false imprisonment and malicious prosecution. The plaintiff required production of documents specified in an affidavit of the third defendant but which the third defendant claimed were privileged from production. The documents were reports made by the third defendant to his superior officers in the Metropolitan Police Force, and communications passing between the Metropolitan Police Force and other police forces. The Secretary of State for Home Affairs swore affidavits indicating that the documents should be withheld from production: he stated that he had formed an impartial judgment and had reached the conclusion that in the public interest, and for the proper functioning of the public service, the documents should be withheld. The plaintiff applied for an order for production of the documents alleging that in indicating that the documents should not be produced the Secretary of State was exercising what was in part a judicial function, and that in the circumstances bias might reasonably be suspected, though actual bias was not alleged. The alleged ground on which bias might be suspected was that the late wife of the Secretary of State had been a member of a family of which another member was married to one of the defendants, who had business interests in certain companies in which other members of the same family were interested.

Held: production of the documents would not be ordered for the following reasons—

(i) assuming (a) that the Secretary of State in deciding that disclosure would be contrary to the public interest was acting judicially in some degree, and (b) that accordingly the test whether his decision was invalidated by bias was whether the plaintiff would be acting reasonably in suspecting bias in reaching the decision, nevertheless the determination of the Secretary of State ought reasonably to be accepted in the circumstances of this case as having been reached without taint of bias.

Cottle v. Cottle ([1939] 2 All E.R. 535) distinguished.

(ii) the determination of the Secretary of State (that production of the documents should be withheld in the public interest) as expressed in his affidavits being on the face of it unimpeachable was in the circumstances of the present case conclusive, and that result was not affected by the consideration that fraud was (as it was assumed for the purposes of argument but not decided) *prima facie* established against the defendants.

Dictum of VISCOUNT SIMON, L.C., in *Duncan v. Cammell Laird & Co., Ltd.* ([1942] 1 All E.R. at p. 595) applied.

Observations of JENKINS, L.J., in *Ellis v. Home Office* ([1953] 2 All E.R. at p. 160) criticised.

Per CURIAM: *O'Rourke v. Darbishire* ([1920] A.C. 581) cannot be regarded as authority for the view that the Crown's ordinary right of withholding disclosure of documents is altogether displaced when fraud is *prima facie* proved (see p. 571, letter G, post).

O'Rourke v. Darbishire ([1920] A.C. 581) distinguished.

Appeal dismissed.

- A [As to production of documents where disclosure is contrary to public interest, see 18 HALSBURY'S LAWS (3rd Edn.) 53, para. 73; and for cases on the subject, see 18 DIGEST (Repl.) 139-142, 1256-1282.]

Cases referred to:

- B (1) *Glasgow Corpn. v. Central Land Board*, 1956 S.C. (H.L.) 1; 1956 S.L.T. 41.
 (2) *Cottle v. Cottle*, [1939] 2 All E.R. 535; Digest Supp.
 (3) *Duncan v. Cammell Laird & Co., Ltd.*, [1942] 1 All E.R. 587; [1942] A.C. 624; 111 L.J.K.B. 406; 166 L.T. 366; 18 Digest (Repl.) 140, 1264.
 (4) *Hennessy v. Wright*, (1888), 21 Q.B.D. 509; 57 L.J.Q.B. 530; 59 L.T. 323; 53 J.P. 52; 18 Digest (Repl.) 141, 1268.
 (5) *Ellis v. Home Office*, [1953] 2 All E.R. 149; [1953] 2 Q.B. 135; 18 Digest (Repl.) 24, 172.
 C (6) *O'Rourke v. Darbishire*, [1920] A.C. 581; 89 L.J.Ch. 162; 123 L.T. 68; 18 Digest (Repl.) 49, 392.

Appeal.

- This was an interlocutory appeal by the plaintiff from an order of ASHWORTH, J., on July 9, 1958, dismissing the plaintiff's appeal from the refusal of Master HARWOOD on Apr. 23, 1958, to order the third defendant, Patrick Bolongaro, to produce documents as regards which the Home Secretary had certified that their production would not be in the public interest.

D. N. Pritt, Q.C., and J. F. F. Platts-Mills for the plaintiff.

The Attorney-General (Sir Reginald Manningham-Buller, Q.C.) and Rodger Winn for the Home Secretary.

- E *H. K. Woolf* for the first and second defendants.

G. De P. Veale, Q.C., and W. W. Stabb for the third defendant.

Cur. adv. vult.

- Nov. 4. LORD EVERSHED, M.R., read the following judgment of the court: The question in this appeal is whether the appellant, the plaintiff in two consolidated actions, can successfully challenge the decision of the Secretary of State for Home Affairs to withhold from production certain documents specified in the second part of an affidavit sworn on Jan. 16, 1958, in the first of the two actions by the third defendant therein, one Patrick Bolongaro. The documents in question are reports made by the defendant as a detective constable in the Criminal Investigation Department to superior officers and communications passing between the Metropolitan Police Force and other police forces. By their inclusion in this part of the defendant's affidavit, the documents must be taken to be in the defendant's possession or power and to be relevant to some subject-matter in the action. But, as appears from their brief description, the documents appear at first sight clearly to be of the class that may be described as official police records; and as such the Secretary of State has determined that they should be withheld from production.

- The question is one of the kind of which from time to time examples have come before the courts in recent years and in which there is an apparent conflict between what is called "the public interest" on the one hand and, on the other, the interests of the due administration of justice and of the parties to particular litigation. As such, the case has, as have other like cases, called for anxious consideration; since although the right and duty of the Crown in certain cases to withhold documents from production is undoubted, the court is bound to look with somewhat jealous care on any exercise of executive powers which have the effect of overriding or ousting the jurisdiction of the courts in matters which are prima facie peculiarly within their province. These anxieties were forcefully expressed by LORD RADCLIFFE, with the concurrence of LORD SOMERVELL, in the recent case of *Glasgow Corpn. v. Central Land Board* (1) (1956 S.C. (H.L.) 1). Where the "public interest" is that concerned, e.g., with the protection of

state secrets, as commonly understood, or with matters related to international A
diplomacy, the primacy of the "public interest" is readily accepted; but the
problem is, at first sight at any rate, less easy when the "public interest" is
that of the proper functioning of some aspect or department of the public service.
In such cases, indeed, the expression "public interest" is perhaps not an alto-
gether happy formula, since it seems on the face of it to overlook the obvious B
fact that the requirements of the due administration of justice are themselves
in the highest degree in the public interest. Nevertheless, it is undoubtedly
also of the first importance to the good order and government of the nation that
those concerned in all departments of the public administration should not be
embarrassed or restricted in the loyal and conscientious discharge of their duties
by fear that what they may confidentially record in the course of those duties
should thereafter be made public. These are the considerations which may justify C
in such cases as the present the right of the Crown to withhold documents from
production. The case being, then, one calling for anxious consideration, as well
as of some public interest, we are much indebted for their arguments to the
learned counsel for the plaintiff and for the defendants, as also to the Attorney-
General and Mr. Winn, who have assisted the court on behalf of the Crown.

In the consolidated actions the plaintiff has made very serious charges against D
the respective defendants thereto. In the first action (with which we are parti-
cularly concerned and in which the third defendant, Bolongaro, is joined) the
charges are, briefly, of conspiracy to injure and defraud, of false imprisonment
and of malicious prosecution. Those charges are of the gravest character, and
it is obvious that, if they are to be made good, they will have to be clearly and
strictly proved. Counsel in opening the case for the plaintiff, quite properly E
indicated the nature of the case he was making; for it was one of his main arguments
that if he showed a *prima facie* case of the fraud he alleged, then the principle
which might otherwise justify the Crown's claim to withhold documents from
production without challenge, was inapplicable. Counsel for the defendant
Bolongaro strongly contended that, at least as against his client, no such *prima*
facie case had been shown. The Attorney-General, on behalf of the Crown, F
without, of course, conceding (as not being a party to the action he could not in
any case do) that a *prima facie* case of fraud had been established on the plaintiff's
part, was content to argue the question of the validity and conclusiveness of the
Secretary of State's decision on the hypothesis that it had. In the circumstances,
it is unnecessary for us to express any view whether on the material so far avail-
able there is a *prima facie* case of fraud against the defendant Bolongaro; and G
we express no view accordingly. For we are in no sense trying the action. But
having regard to the publicity which, naturally enough, a case like the present is
apt to attract, we think it right to make it plain that by a *prima facie* case is
meant no more than a case which calls for an answer. We repeat that we express
no view whether such a case has been made out. Certainly the defendants, in-
cluding the defendant Bolongaro, have not so far had the opportunity of answering H
any such case. We think it also right to make clear that, as counsel for the plaintiff
very readily conceded, the effect of the non-disclosure of the documents in
question may, if sustained, be by no means to the exclusive disadvantage of the
plaintiff.

With this introduction it will be both logical and convenient for us to deal I
first with the plaintiff's claim to disqualify the affidavits sworn by the Secretary
of State on the ground that the latter's connexion with or interest in the first
two defendants, Colonel and Mrs. Rayner, and the businesses with which they are
connected infects the Secretary of State with such liability to bias as would
reasonably be regarded as disabling him from personally arriving at a fair
judgment on the question of disclosure of the documents; for if this point is
made good, then it would, according to the argument, follow that the affidavits
so far sworn by the Secretary of State could not be regarded in any case as con-
clusive of the matter. It should be said at once that counsel for the plaintiff has

A not suggested that the Secretary of State, Mr. Butler, was in fact so biased: but it was said, nevertheless, that a man in the situation of the plaintiff (having been the defendant in an action brought against him by the defendants Rayner, which had been abandoned after nearly two years, and having been charged in criminal proceedings arising out of the same subject-matter, which proceedings had been stopped at the trial by the judge) would reasonably regard the Secretary of State as being so biased. We agree entirely with the learned judge that these suggestions of bias should be wholly rejected.

The justification for the suggestion of bias arises from the circumstances that the late wife of the Secretary of State was a member of the well-known Courtauld family (having been a daughter of the late Samuel Courtauld); that he holds a number of shares in Courtaulds, Ltd., and that he was a director of that company before becoming a Minister of the Crown. The defendant Colonel Rayner's brother is also married to a member of the Courtauld family, viz., the daughter of Samuel Augustine Courtauld, first cousin to the late Mrs. Butler's father; and the defendant Rayner is also a director of and shareholder in certain companies (connected with the film industry) in which other members of the Courtauld family (namely, Mr. J. S. Courtauld and Mr. S. L. Courtauld) were during their lives co-directors with him, their shareholdings being now vested in their estates. We thought it right in the circumstances to look at two affidavits sworn since the hearing before ASHWORTH, J., one by the plaintiff himself and one by a Mr. Coulson, a chartered accountant. To the former is exhibited a "pedigree" of the Courtauld family and other exhibits showing (inter alia) the devolution of the estates of members of the family. These exhibits show that the members of the family were and are persons of substance who may be said to be closely linked together as a family. To Mr. Coulson's affidavit one of the exhibits consists of what he has called a

"schedule of brief particulars of companies in which the defendants [Colonel and Mrs. Rayner] and/or associates of theirs . . . have been concerned as directors, secretaries or in other ways."

F We have examined this material, but we do not refer in greater detail to it. For, as counsel for the plaintiff fairly conceded, it does not amount to very much. In our view, the learned judge was well justified in describing the link between the Secretary of State and the defendants Rayner, by marriage and otherwise, as "extremely slender". We have already observed that no bias in fact is alleged. G Indeed, if the matter is viewed dispassionately, it is, in our judgment, extravagant to suppose that one holding the responsible position which Mr. Butler holds, having his long experience of public affairs, and having also available to him the skilled advice which his department can provide, would, in such a matter as this, relating to reports by junior to senior police officers and communications between police forces, be in the least disabled or disqualified by reason of the private interests to which we have alluded.

H It was contended, however, that the Secretary of State was exercising a duty and a function which was in some degree judicial, since it involved a weighing up of the interests of the public service on the one hand and, on the other, those of the due administration of justice and of individual litigants in a lawsuit; and this being so, that the test of reasonableness must be that fairly attributable to one in the situation of the plaintiff in that litigation: in other words, that the question is whether the plaintiff, in the light of the experience which he alleges, would reasonably suspect the Secretary of State of bias. For this proposition counsel for the plaintiff referred to the case in the Probate, Divorce and Admiralty Division of *Cottle v. Cottle* (2) ([1939] 2 All E.R. 535). In that case a husband who was a party to matrimonial proceedings before magistrates questioned the propriety of the chairman of the bench adjudicating in the matter. The objection was based on the admitted fact that the chairman was a close friend of the wife's mother and also, on evidence given by the husband, that his wife had told him

she would bring the dispute before the chairman who would "put him (the husband) through it". In the circumstances it is not surprising that the conclusion of the Divisional Court was to the effect that the husband might reasonably lack confidence in the chairman's impartiality, and that in the interest of the due administration of justice, including the principle that justice should appear manifestly to be done, the chairman should be regarded as disabled from adjudicating in the case. We refer again later to the question whether in a case such as this the Secretary of State should be regarded as in any sense exercising a judicial, as distinct from a purely executive, function. But assuming that he is in any sense "adjudicating", it is plain that the circumstances of the present case are, for present purposes, very widely different from those in *Cottle v. Cottle* (2). As we have said, the link between the interests of the Secretary of State and those of the defendants Rayner is extremely slender. Moreover, in reaching his determination he is not adjudicating on the issues between the plaintiff and the defendants Rayner, and he is not alleged to have any community of interest at all with the defendant Bolongaro. His function (so far as the question of alleged bias is relevant) is to decide between interests of a department of the public service and those of the parties (defendants as well as plaintiff) to certain litigation.

If there is justification for the charges made in the action by the plaintiff, he no doubt feels and is entitled to feel strongly about the events narrated in his statement of claim. But, allowing for all this and assuming that the test of reasonableness is to be applied in reference to one in the plaintiff's position, and assuming also, as we have done, that the Secretary of State should be regarded as having in some degree acted judicially, still we are quite unable to accept the plaintiff's contention that the Secretary of State's determination must be treated as disqualified from finality on the ground of liability to bias. In his second affidavit of Apr. 18, 1958, Mr. Butler has sworn that at the time when he swore his former affidavit the circumstances above mentioned alleged to justify the suggestion of bias were not present to his mind; and that, having had his attention since drawn to them, he none the less remains of opinion that in the public interest the documents should be withheld from production. In our judgment, making the allowances and assumptions above mentioned in his favour, the plaintiff ought reasonably and without reserve to accept it that the Secretary of State's determination is without taint of bias.

The question of bias being out of the way, it must follow that the objection to the Secretary of State having personally determined the question of disclosure is also disposed of. It was the contention of the Attorney-General, founding himself on the language of VISCOUNT SIMON, L.C., in *Duncan v. Cammell Laird & Co., Ltd.* (3) ([1942] 1 All E.R. 587) and his citation of the judgment of WILLS, J., in *Hennessy v. Wright* (4) ((1888), 21 Q.B.D. 509) (see [1942] 1 All E.R. at p. 593), that in all these cases the decision and the responsibility for it must be taken by the ministerial head of the department, save in the exceptional circumstances mentioned by LORD SIMON, which have no present application. We think that this is the correct view: and in any case, as counsel for the plaintiff observed, the Secretary of State has in the present case himself in fact assumed the responsibility. The only question then remaining is whether the decision of Mr. Butler, expressed in his two relevant affidavits, must be taken as conclusive: for counsel has not before us proceeded with either of the two grounds suggested before ASHWORTH, J., for showing that the *Cammell Laird* case (3) is no longer binding authority.

It was again a contention of the Attorney-General, founded on LORD SIMON's speech and particularly on the language of a passage in that speech ([1942] 1 All E.R. at p. 595), that the decision is conclusive; that the function of the Minister is merely executive and in no sense judicial, and, therefore, not liable or capable of review in the courts; and, indeed, that the Minister was not at all concerned

A with the details or nature of the litigation in which the question of disclosure has arisen. If the certificate of the Minister is on the face of it, that is in form, valid, that (according to the submission of the Attorney-General) is the end of the matter.

B On the other side, counsel for the plaintiff contended, first, that where the action charged fraud and, particularly, where a public servant was alleged to be party to the fraud, and where a prima facie case for such fraud had been made out, then the principles which would or might ordinarily render sacrosanct a ministerial decision were displaced; with the result (as we assume) that it would then be competent for the court to determine whether in truth the "public interest", that is the interest of the department concerned as a department of state or its equivalent, outweighed the requirements of the due administration of justice.

C In support of this contention counsel for the plaintiff argued that if it were prima facie shown that the documents concerned had been contrived in pursuance or furtherance of the fraud, then it followed that there was no room for, or relevance in, the argument that the public interest required that the completeness and candour (and particularly the latter) of official reports and the like should be treated as confidential.

D Secondly, and more broadly, counsel for the plaintiff disputed the proposition that the Minister was in no sense acting judicially in his determination. He particularly relied on the observations of JENKINS, L.J., in *Ellis v. Home Office* (5) ([1953] 2 All E.R. 149), where he said (*ibid.*, at p. 160):

E "But I would urge that in the interests of justice—particularly in a case like the present, which concerns a claim of one of Her Majesty's subjects against a government department—documents within the ambit of privilege should be most carefully scrutinised, and the person entrusted with that task should, in regard to each document, ask himself whether it is relevant to the plaintiff's case, whether the plaintiff's case will be hampered or impeded if it is not made available, and, if so, whether the probability of any harm being done to the public interest by disclosing it is sufficient to outweigh those other considerations."

F

It was argued that if effect were to be given to those requirements it followed that the Minister must acquaint himself with the relevant facts of the case in suit and must weigh, and form a judgment on, the relative claims of the departmental interest on the one hand and the administration of justice on the other.

G We do not propose to attempt any exposition of the principles laid down in the cases, and particularly in the *Cammell Laird* case (3), which would or might be applicable to other than the circumstances of the present appeal—except to express the opinion which we have clearly formed that *O'Rourke v. Darbishire* (6) ([1920] A.C. 581) cannot be regarded as authority for the view that the Crown's ordinary right of withholding disclosure of documents is altogether displaced wherever fraud is alleged or prima facie proved. *O'Rourke v. Darbishire* (6) dealt with the right to privilege from discovery which the private individual in certain circumstances has. In our judgment its principles are not applicable to the right of the Crown to withhold documents from discovery, a right somewhat misleadingly called "Crown privilege". Where in an action between private individuals fraud is alleged, the parties concerned lose the benefit of their private right to privilege. But here there is no right which a private person can forfeit.

H

I It is a public right required and justified by the administration of public affairs.

Notwithstanding the argument of the Attorney-General, we were informed by Mr. Winn that in the present case the Secretary of State had in fact informed himself of the nature of the present action and of the allegations made therein, and had also borne in mind the effect on the presentation of the cases both of the plaintiff and of the defendant Bolongaro of the withholding of the documents in question, including the consequence that the latter would not be able to give secondary evidence of their contents; and that, having considered those matters,

the Secretary of State had reached his decision for non-disclosure. The form of language of Mr. Butler's two relevant affidavits reflects what Mr. Winn said; for the Secretary of State speaks of having formed "an impartial judgment" and he states clearly the conclusion that in his view in the public interest, and for the purpose of the proper functioning of the public service, the documents in question should be withheld from production. A

In those circumstances we are of opinion that the form of the Secretary of State's "certificate", being on the face of it unimpeachable, and the conditions to which LORD SIMON referred in the *Cammell Laird* case (3) ([1942] 1 All E.R. at p. 595) at least not being shown not to have been satisfied, the court is bound to treat the certificate as conclusive. Even if the language of JENKINS, L.J., in *Ellis v. Home Office* (5) be regarded as indicating a Minister's duty in reaching his conclusion (on which we express no view), then again it is in our judgment not shown that such duty was not in this case performed; and the result is the same. For we observe that the language of the lord justice which we have quoted followed immediately his statement that it was right that the decision of the responsible Minister on the question of disclosure or non-disclosure should be final. If the two passages are read together the result lends support to the view that the observations on which counsel for the plaintiff relied were merely by way of advice or admonition; that the Minister is in no way concerned as such with the issues between the parties or the relative importance in an action of the material sought to be disclosed. The Minister should no doubt accept and recognise that the proper administration of justice may be impeded or may be unattainable if any document or any evidence which the court would allow to be seen by the parties or which the court would allow to be put or given in evidence is withheld. Nevertheless his sole concern is whether the interests of the State in the sphere for which he is the responsible official would be so affected that the Crown should withhold documents or evidence from the parties and the court. B C D E

In our judgment, therefore, the result in the present case is not affected by the consideration that fraud is alleged or, as has been assumed for the purposes of the present argument, *prima facie* established. Nor is the result affected, if it was the duty of the Minister to weigh in the balance the considerations to which LORD SIMON referred in the *Cammell Laird* case (3) ([1942] 1 All E.R. at p. 595), or to which JENKINS, L.J., alluded in *Ellis v. Home Office* (5) ([1953] 2 All E.R. at p. 160). That, as we think, is sufficient to dispose of the present appeal. As we have said, it is not necessary, nor do we think it useful, for us to express further views which would only be applicable in circumstances other than those of the present case. In particular, we express now no view on the question (which in our judgment does not arise on this appeal) what the result might be in a case where the Secretary of State's certificate or conclusion were on the face of it expressly based on the premise that the document or documents which he had determined to withhold was or were of a particular character or class and it were then shown aliunde that in fact he had been mistaken in the premise. F G H

Appeal dismissed. Leave to appeal to the House of Lords refused.

Solicitors: W. H. Thompson (for the plaintiff); Treasury Solicitor; Herbert Baron & Co. (for the first and second defendants); Solicitor, Metropolitan Police (for the third defendant).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

A **CARSON (INSPECTOR OF TAXES) v. PETER CHEYNEY'S EXECUTOR.**

[HOUSE OF LORDS (Viscount Simonds, Lord Morton of Henryton, Lord Reid, Lord Tucker and Lord Keith of Avonholm), October 27, 29, November 25, 1958.]

B *Income Tax—Profits—Death of taxpayer—Periodical payments under deceased's contracts received by executor—Author's royalty payments—Liability of payments to tax—Income Tax Act, 1918 (8 & 9 Geo. 5 c. 40), Sch. 1, Sch. D, Cases II, III, VI—Income Tax Act, 1952 (15 & 16 Geo. 6 & 1 Eliz. 2 c. 10), Sch. D, Cases II, III, VI.*

C An author entered into contracts with different publishers, in three of which he undertook to write or deliver books for publication and in the fourth of which he licensed publication in the French language of one of his existing works. During his lifetime the royalties were assessed, admittedly correctly, under Case II of Sch. D to the Income Tax Act, 1918, on a receipts basis as they fell due under the contracts. After his death in June, 1951, the royalties under the contracts which were received by his executor were assessed to tax under Case III or alternatively Case VI of Sch. D to the Act of 1918, and of Sch. D to the Income Tax Act, 1952.

D **Held:** the royalties were not liable to tax, since they were receipts of the author's professional activities, which ceased with his death, and were not income from an income-bearing asset, and did not change their quality on his death so as to become assessable under Case III or Case VI of Sch. D.

E *Gospel v. Purchase* ([1951] 2 All E.R. 1071) followed.

Decision of the COURT OF APPEAL ([1957] 3 All E.R. 391) affirmed.

[As to the charge of professional earnings to tax under Case II of Sch. D, s. 123 of the Income Tax Act, 1952, ceasing on death, see 20 HALSBURY'S LAWS (3rd Edn.) 241, para. 443, text and note (e); as to the nature of payments charged under Case III of Sch. D, see *ibid.*, 247, 248, para. 453; and as to the scope of Sch. D, see *ibid.*, 281, para. 508.]

F For Cases III and VI of Sch. D of Sch. 1 to the Income Tax Act, 1918, see 12 HALSBURY'S STATUTES (2nd Edn.) 167, 173; and for Cases III and VI of Sch. D, s. 123 of the Income Tax Act, 1952, see 31 HALSBURY'S STATUTES (2nd Edn.) 116, 132.]

G Cases referred to:

- (1) *Gospel v. Purchase*, [1951] 2 All E.R. 1071; sub nom. *Stainer's Executors v. Purchase*, [1952] A.C. 280; 32 Tax Cas. 367; 3rd Digest Supp.
- (2) *Bennett v. Ogston*, (1930), 15 Tax Cas. 374; Digest Supp.
- (3) *Inland Revenue Comrs. v. Sangster*, [1920] 1 K.B. 587; 89 L.J.K.B. 673; 122 L.T. 374; 12 Tax Cas. 208; Digest Supp.
- (4) *Curtis Brown, Ltd. v. Jarvis*, *Jarvis v. Curtis Brown, Ltd.*, (1929), 14 Tax Cas. 744; Digest Supp.
- (5) *Asher v. London Film Productions, Ltd.*, [1944] 1 All E.R. 77; [1944] K.B. 133; 113 L.J.K.B. 149; 170 L.T. 17; 2nd Digest Supp.

H **Appeal.**

I Appeal by the Crown from an order of the Court of Appeal (JENKINS, PARKER and PEARCE, L.JJ.), dated Oct. 21, 1957, and reported [1957] 3 All E.R. 391, affirming an order of HARMAN, J., dated June 6, 1957, and reported [1957] 2 All E.R. 698. HARMAN, J., dismissed the Crown's appeal against a decision of the General Commissioners of Income Tax for Bromley, Kent, on an appeal by the respondent taxpayer, the sole surviving executor of the will of R. E. Peter S. Cheyney, deceased, against assessments to income tax made on him under Sch. D to the Income Tax Acts, 1918 and 1952, for 1951-52 (totalling

£10,000) and 1952-53 (totalling £18,000). The question for determination was whether sums paid to the executor after the death of Peter Cheyney as royalties under agreements entered into by him were assessable to tax under Case III or Case VI of Sch. D. The facts appear in the opinion of VISCOUNT SIMONDS. A

The Attorney-General (Sir Reginald Manningham-Buller, Q.C.), H. B. Magnus, Q.C., and A. S. Orr for the Crown. B

Viscount Bledisloe, Q.C., and C. N. Beattie for the taxpayer.

The House took time for consideration.

Nov. 25. The following opinions were read.

VISCOUNT SIMONDS: My Lords, the question for your Lordships' determination is whether the Commissioners for the General Purposes of the Income Tax, HARMAN, J., and the Court of Appeal were all wrong in holding that the respondent taxpayer, who is the executor of a well-known writer of detective fiction known as Peter Cheyney, is not assessable to income tax under Sch. D in respect of royalties which were received by him as such executor under contracts made by Peter Cheyney during his lifetime. C

I will summarise the facts as they appear in the Case Stated by the General Commissioners and the annexed documents. Peter Cheyney was a writer by profession and he carried on his profession, as writers often do, by entering into contracts with publishers under which, in return for royalties of varying amounts, the copyright in his works became vested in them. These contracts, which were numerous, took various forms. In some cases, notably in a contract made with Faber and Faber, Ltd., relating to a work described as "Provisionally Entitled 'Making Crime Pay'", the work in question had not yet been written, or at any rate not completed, at the date of the contract. In others, the work had been completed and there was, therefore, an existing copyright in it. In one case which has been regarded as demanding special consideration, the contract took the form of a licence to translate an existing work into French. Subject to what may be said about the last-mentioned contract, I do not think that any distinction can validly be made between any of the contracts. In all of them the author carried on his profession by exploiting his work in the usual way. A writer might, I suppose, carry on his profession without doing so, but the Income Tax Acts contemplate the carrying on of a profession for gain and that is what Peter Cheyney did. He was, accordingly, assessed during his lifetime under Case II of Sch. D in respect of the royalties so received by him after deducting therefrom all proper and allowable expenses of carrying on his profession. There is no doubt that he was rightly so assessed and counsel for the Crown very properly admitted that he could not lawfully have been assessed under any other Case of any other Schedule. It must be recorded also that he was consistently assessed on a form of receipts basis being credited with royalties on the day when they fell due for payment and no account being taken of the present value of royalties due at a future date. D

Peter Cheyney died on June 26, 1951. Royalties falling due under the several contracts after his death were received by his executor, and on him first and additional assessments were made under Sch. D for the years 1951-52 and 1952-53 in the sums of £10,000 and £18,000 respectively. The question is whether they were rightly made. The executor also received sums in respect of contracts made by him with publishers after Peter Cheyney's death and admitted his liability to assessment in such sums. He may have been right or wrong in doing so. That question has not been in dispute nor have their Lordships seen the contracts. The matter is irrelevant to the present issue. E

The assessments for 1951-52 are governed by the Income Tax Act, 1918, and those for 1952-53 by the Income Tax Act, 1952, but there is no material difference between the relevant provisions of the two Acts. It is enough, F

A therefore, to refer to s. 123 of the Act of 1952 under which income tax is chargeable under Case III of Sch. D in respect of “(a) any interest of money, whether yearly or otherwise, or any annuity, or other annual payment” under Case V in respect of “income arising from possessions out of the United Kingdom” and under Case VI in respect of any annual profits or gains not falling under any of the Cases I to V and not charged by virtue of Sch. A, Sch. B, Sch. C or Sch. E. It was not stated in the assessments under which of the Cases of Sch. D they were made, and I understand that it is not considered necessary to do so. Before the commissioners and before the courts below it was contended that they were properly made under Case III or, alternatively, under Case VI. Before this House, Case V was also invoked, but in the view which I take nothing turns on this.

C My Lords, it was inevitable that a large part of the argument should turn on a recent decision of this House in which two of your Lordships and I took part, the taxpayer contending that it governed the present case, the Crown that it was distinguishable. I refer to *Gospel v. Purchase* (1) ([1951] 2 All E.R. 1071; sub nom. *Stainer's Executors v. Purchase*, 32 Tax Cas. 367) (hereinafter called “*Stainer's case*”). In that case, I said that I agreed with and adopted every word of the judgment of JENKINS, L.J., in the Court of Appeal, and I repeat what I then said in regard to the judgment of the Court of Appeal delivered by the same lord justice in the present case. I, therefore, absolve myself from the need to compare at length the facts of the two cases and will state as shortly as I can the facts and the principles which appear to emerge from the earlier decision.

E *Stainer's case* (1) was concerned with assessments made on the executors of Mr. Stainer, a professional film actor and producer (who went by the name of Leslie Howard), in respect of payments made to them under contracts for the exploitation of films to the making of which Leslie Howard had given his professional services as actor or producer or director. The payments consisted of percentages or shares of the profits of exploitation. During his lifetime he was assessed under Case II, his receipts in respect of all his professional activities being brought into account against his proper expenses of carrying on his profession. After his death further payments were made to his executors under the same contracts. It was not suggested that anything further had to be done to earn these payments. They were the reward for Leslie Howard's professional services rendered during his lifetime. It was, however, contended on behalf of the Crown, just as it has been contended in the present case, that they had, after the death of Leslie Howard, acquired a new taxable quality and, as they were no longer assessable under Case II since no profession was being carried on, were assessable under Case III or Case VI. This contention was decisively rejected. JENKINS, L.J., said ([1951] 2 All E.R. at p. 1079):

H “... I think it is equally clear that the assessment to tax of the profits of a profession under Case II of Sch. D down to the date of discontinuance is to be taken as covering all remuneration earned in the course of such profession, whether received prior to or after such discontinuance, and that, the liability to tax being thus exhausted so far as remuneration is concerned, nothing which is, in truth, remuneration so earned can afterwards be charged to tax merely because the mode of ascertaining and paying it is such that it might have been charged to tax under some other Case if it had not been remuneration so earned.”

I In a speech, in which the other members of the House concurred, I expressed the same view with equal emphasis and less felicity. The principle which emerges is clear. Payments which are in historical fact (I adopt the language of the late LORD ASQUITH OF BISHOPSTONE in the same case (*ibid.*, at p. 1075)) exclusively the fruit or aftermath of professional activities do not change their

taxable character when the profession is discontinued.

But there was another aspect of *Stainer's* case (1) which is relevant to the present case. Perhaps it is no more than a different way of stating the same point. It was urged that the contracts made by Leslie Howard were "income-bearing assets", and that the payments made to his executors were the income of such assets. To this the same noble Lord gave an answer which I venture to quote, so completely does it dispose of a similar argument in the present case. He said (*ibid.*, at p. 1076):

"The contracts in the present case enjoy, in my view, no such independent vitality. The consideration for what Mr. Howard was to do—to act or manage—was not the grant of a contract or contracts, but the payment of money under the terms of those contracts. Mr. Howard acted for money: he did not act for contracts. The contracts were mere incidental machinery regulating the measure of the services to be rendered by him, on the one hand, and, on the other, that of the payments to be made by his employers. They were not the source, but the instrument, of payment, and his death, in my view, did nothing to divest them of that character."

My Lords, I do not see how, in face of this decision, the Crown's argument can succeed without a degree of refinement which is to be avoided in the realm of fiscal law. In *Stainer's* case (1) it could not be denied that the taxpayer acquired under his contracts certain contractual rights, nor that those rights could, in a certain context, be called property. So it was argued that the payments were the income and the contracts were the "income-bearing assets". I will again content myself with the description given to this argument by JENKINS, L.J., and ask how it is to be distinguished from the argument in the present case. When I do so, I find myself using again the same language that LORD ASQUITH used and I used in *Stainer's* case (1). What else were these payments than the fruit of Peter Cheyney's professional activities? How is it relevant that, in order to reap his harvest, he had to enter into contracts under which he acquired rights and incurred obligations as did the publishers with whom he contracted? And how is it relevant that it was a term of those contracts that there should be vested in the publishers a right created by the law to protect him in the exploitation of his work? It was by entering into such contracts that he was able to carry on his profession gainfully. It was because he did so that he was assessable to tax under Case II of Sch. D. I reject, therefore, the plea that the royalty payments could, whether during the carrying on of the profession or after its discontinuance, be regarded as "income from property, constituting a substantive subject-matter of taxation under Sch. D"—I use the words of the Crown's formal Case. I will only add in deference to the ingenious argument of counsel for the Crown that the realities of the situation are not changed by saying that the royalties were throughout paid in consideration of the grant of a licence to use copyright and were, therefore, the income of property, that, during the carrying on of the profession, they could be regarded as income under Case II but that, having always the character of income of property, they became taxable in that character when the profession was no longer carried on. This is really only saying the same thing in other words and is to be similarly answered. First and last and all the time the payments are professional earnings, whatever be the mechanism through which they are paid. On this part of the case I will offer a final consideration. In *Stainer's* case (1) (*ibid.*, at p. 1074) I said:

"If in all the circumstances it was not possible to bring the sums into account in the years in which they were earned . . . the result is not to change the character of the payment, but to exhibit that some professional earnings may escape the income tax net."

There, I believe, lies the root of the trouble. *Prima facie* there is no reason

A why a professional man should not be taxed on an earnings basis, but in the case of an author whose earnings depend on the unpredictable popularity of his books in future years an assessment in the earning year would be so arbitrary as to be patently unfair. But that, I repeat, does not entitle the Crown to regard payments in future years as anything but what they essentially are.

B An attempt was made, as I observed some time ago, to distinguish the contract under which Peter Cheyney granted a licence to translate one of his novels into French. HARMAN, J., felt some difficulty about the royalties paid under this contract, but I have come to the conclusion, as did the Court of Appeal, that the distinction is too fine to be material. It appears to me that by this as by his other contracts the author was exploiting the work of his brain. The fees or royalties that he got were part of his professional earnings and during his life were, no doubt, included in his assessment under Case II. After his death they cannot validly be distinguished.

C It is not necessary, my Lords, to say anything about Case VI or Case V. The reasons for dismissing an appeal which relies on Case III are fatal to them also.

D In the course of the argument a number of authorities were referred to. Apart from *Stainer's* case (1) and *Bennett v. Ogston* (2) ((1930), 15 Tax Cas. 374), concerning which I can say no more than I said in *Stainer's* case (1), I do not think that any of them throw any light on the present problem. I doubt not that, in a proper context, royalties may be described as income of an investment as in *Inland Revenue Comrs. v. Sangster* (3) ((1919), 12 Tax Cas. 208), nor that, as in *Curtis Brown, Ltd. v. Jarvis, Jarvis v. Curtis Brown, Ltd.* (4) ((1929), 14 Tax Cas. 744), copyright royalties may be merged in the receipts of a trade, but I do not think that these cases assist in the solution of the problem now before the House.

The appeal should, in my opinion, be dismissed with costs.

LORD MORTON OF HENRYTON: My Lords, it appears from the

F Case Stated that, during his lifetime, Mr. Peter Cheyney had entered into from fifty to sixty agreements with publishers to write books, or for the publication of books already written. Four only of such agreements were put in evidence, and it was agreed between the parties that the decision of the court as to sums paid under these four agreements should apply to moneys paid under all other agreements, unless the court should distinguish one of these four agreements from another. It was further agreed that all the agreements made by the deceased from which royalties arose, could, as regards form, be classified into one of the categories of which these four agreements are representative.

G The agreements were exhibited to the Case and marked respectively A (i), A (ii), A (iii), and A (iv). My Lords, as regards the agreements A (i) and A (ii), there is, to my mind, no valid distinction between the present case and *Gospel v. Purchase* (1) ([1951] 2 All E.R. 1071; sub nom. *Stainer's Executors v. Purchase*, 32 Tax Cas. 367) (hereinafter called "*Stainer's* case"). In the present case, Mr. Cheyney was remunerated for writing books which were "to be written"; in *Stainer's* case (1), Mr. Leslie Howard was remunerated for producing or directing or acting in films. It is possible to point to differences in the form which the remuneration took, but in each case the remuneration was for professional activities to be carried out by a man carrying on a profession.

I In the case of A (iii), it is not quite clear whether the four works to be "delivered" to the publishers had been written or were about to be written, but I see no reason for assuming, in favour of the Crown, that they had already been written, and counsel for the Crown did not at any time seek to distinguish this agreement from A (i) and A (ii). Agreement A (iv) is of a somewhat different nature, in that it related to a work already published entitled "Making Crime Pay". By the agreement, the author granted to the publishers the sole licence to translate the work and publish it in volume form in the French language.

It could possibly be said that the author had finished his professional activity in regard to the book by writing it, and that the sums to be received under this agreement were income arising from property, namely, from the copyright in the book, within s. 122 of the Income Tax Act, 1952, and were taxable under s. 123 of the same Act, either as coming within Case III or, as the publishers were a French firm, within Case V. However, no point of this kind was raised by the Crown during the author's lifetime, and counsel for the Crown did not seek now to draw any distinction between this agreement and the other three. I think it can fairly be said that these sums had "the essential quality of being the fruit of his professional activity", to quote from the speech of LORD SIMONDS, L.C., in *Stainer's case* (1) ([1951] 2 All E.R. at p. 1074), and none the less so because they were received in respect of a completed work. As JENKINS, L.J., put it, in delivering the judgment of the Court of Appeal ([1957] 3 All E.R. at p. 399):

"It [that is, the copyright] was brought into existence by his professional activity in the writing of books and by nothing else, and it was just as much part of his profession to turn his literary labours to account by licensing the copyright he had created to publishers as it was to write the books in which the copyright subsisted."

If the sums in question had the quality of professional earnings during the author's lifetime, I cannot see that his death in any way changed their quality. I would dismiss the appeal.

LORD REID: My Lords, Mr. Peter Cheyney, who died on June 26, 1951, was a well-known author. At that date he had some fifty or sixty agreements with publishers in this country and abroad, under which he was entitled to receive from time to time royalties and other sums. During his lifetime he was assessed to income tax under Case II of Sch. D in respect of his earnings in his profession of authorship. The "full amount of the profits or gains" of his profession was computed by taking as his receipts in each year all sums falling due to be paid to him during the year under these agreements and deducting all allowable expenses incurred by him during the year. No question arises as to tax due in respect of the period before his death.

Royalties due under these agreements continued to be paid to Mr. Cheyney's executor after his death, and, in respect of these royalties, assessments under Sch. D were made on the executor totalling £10,000 for the year 1951-52 and £18,000 for the year 1952-53. The executor, the respondent in this appeal, appealed against these assessments, and the assessments were discharged by the commissioners. An appeal against this decision by the Crown was dismissed by HARMAN, J., and a further appeal was dismissed by the Court of Appeal on Oct. 21, 1957.

A taxpayer, who in any year earns a right to receive money by trading or by the exercise of his profession, may not receive that money, or it may not become payable during the year when he acquired the right to receive it. So, when his trade or profession is discontinued, there may be sums, often large sums, outstanding. And there may also be expenses allowable as deduction which he has not yet paid. The question may then arise whether, or to what extent, such postponed receipts can be taken into computation for income tax purposes. By one method of accounting, his profits or gains during each year can be computed by taking, not the sums which he has actually received during the year, but the sums which he has earned during the year. Receipts during the year which have been taken into computation in previous years as having been earned then will not swell the computation for the year in question, but this computation will take account of what has been earned during the year in question though not yet received. In that way money earned during the continuance of the trade or profession but not payable or received until after its

A discontinuance would not escape from computation for income tax. But that method was not adopted in the present case. Probably it could not have been adopted, if only because it was impossible to determine the amount of royalties which might ultimately accrue; any estimate of their amount would have been a mere guess.

B In the ordinary case of professional earnings, which are outstanding when the profession is discontinued and which cannot be brought into computation for the period before the discontinuance, it has long been recognised that there is no provision in the Income Tax Acts which subjects them to charge and that they, therefore, escape from taxation. I need only refer to the statement of the law by ROWLATT, J., in *Bennett v. Ogston* (2) ((1930), 15 Tax Cas. 374 at p. 378) quoted with approval by my noble and learned friend, LORD SIMONDS, L.C., in *Gospel v. Purchase* (1) ([1951] 2 All E.R. 1071 at p. 1074; sub nom. *Stainer's Executors v. Purchase*, 32 Tax Cas. 367 at p. 410) (hereinafter called "*Stainer's case*"):—

D " 'When a trader or a follower of a profession or vocation dies or goes out of business . . . and there remain to be collected sums owing for goods supplied during the existence of the business or for services rendered by the professional man during the course of his life or his business, there is no question of assessing those receipts to income tax; they are the receipts of the business while it lasted, they are arrears of that business . . . and are taken to be covered by the assessment made during the life of the business, whether that assessment was made on the basis of bookings or on the basis of receipts.' "

E That does not expressly deal with the case where the sums remaining to be collected are of such a character that they could be regarded as annual payments.

F Turning to the facts of the present case, it appears to me that the first question to be determined is whether these royalties were professional earnings assessable under Case II during Mr. Cheyney's lifetime; and the second question is whether, if they were professional earnings, they also had some other character by virtue of which they could be assessed to tax under some provision other than Case II either during his lifetime or later. There is no dispute about the first question. These royalties were, in fact, assessed under Case II in so far as they were payable during Mr. Cheyney's lifetime. It is not suggested that that was wrong, and I think it was clearly right. One way, and perhaps the commonest way, for an author to make money out of his profession is to make G agreements with publishers under which he receives royalties. And it appears to me to be impossible to argue that, though an instalment of royalties payable the day before Mr. Cheyney died was part of his professional earnings, an instalment payable the day after his death was not. It might have some other character in addition but it could not cease to be a part of his professional H earnings.

I The question, then, is whether these royalties had a dual character; whether, in addition to being professional earnings, they were of such a character that they could be assessed under some other Case than Case II. The assessments which the Crown seeks to support were simply made under Sch. D, and they would be valid if they could be justified under any Case of that Schedule. Counsel for the Crown expressly admitted that, during Mr. Cheyney's lifetime, they could not have been assessed under any Case other than Case II. In my opinion, that admission was properly made, and for this reason. A taxpayer carrying on a profession is entitled to set against his gross receipts all allowable expenses which he has incurred in earning those receipts; he can do that if assessed under Case II but he could not do it otherwise. The Crown's case must, therefore, be that, although royalties payable before Mr. Cheyney's death could not be assessed under any Case other than Case II, royalties payable after his death can be so assessed.

It is quite possible for receipts to have such a dual character that the Crown can elect under which Case they shall be assessed. We were referred to some of the insurance company cases, where a large part of the receipts of the company consisted of dividends or interest from investments. Instead of assessing the company on the profits of its business under Case I, the Crown is entitled to assess under Case III on the amount of the annual payments received by the company. But that right does not arise only after the company has ceased to carry on business. The nature of the payments received by the company is such as to bring them within the scope of Case III whether the company is carrying on business or not. But, in the present case, it is admitted that that is not so; the nature of these royalties is such that they cannot be assessed under any case other than Case II so long as the author is following his profession. But it is argued that they can be so assessed after the profession is discontinued. The nature of the royalties does not change on the death of the author; they are still payable under the same contracts and, as I have said, they are still part of professional remuneration. But the circumstances are different because the profession has been discontinued. No further expenses allowable as deductions can be incurred, and assessment under Case II is no longer possible. Can this change of circumstances bring within the scope of Case III payments which had formerly not been within its scope?

That question arose in *Stainer's* case (1). But before I proceed to examine that case, it may be well to see what are the differences between the facts in the present case and the facts in that case. In both cases, the payments in respect of which the executors were assessed were payments of royalties due under contracts made by the deceased which only became payable after the date of his death. In *Stainer's* case (1), they were royalties due to a producer of films; in this case, they are royalties due to a writer of books. In both cases, earlier payments under the same contracts made during the lifetime of the deceased were admittedly part of his professional earnings. In *Stainer's* case (1), the payments had been earned chiefly by Mr. Stainer, who was known professionally as Leslie Howard, giving his professional services as a producer and actor; there was also an element of copyright in the case, but I am prepared to regard *Stainer's* case (1) as simply a case of payment for professional services, the payment taking the form of royalties spread over a considerable period. In the present case, there was an element of rendering professional services, because some of the contracts were contracts under which Mr. Cheyney undertook to write books for publication by the publishers. But much stress was laid by the Crown on the contention that the contracts were really means adopted by Mr. Cheyney for exploiting property which he had created, his copyright in books which he had written. Some of the contracts were of that character, and, if the Crown cannot succeed with regard to these contracts, it certainly cannot succeed with regard to the others. So I shall consider the present case on the footing most favourable to the Crown, i.e., that the sums assessed were instalments of fees payable under contracts obtained by Mr. Cheyney in exploiting his copyright in books written by him by licensing publishers to publish or translate them. But I must add that, even so, there is an essential difference between that case and the case of a person who buys a copyright from the author and then proceeds to exploit it by granting licences to publishers. Where the author exploits his own copyright by granting licences to publishers, the fees which he receives are admittedly part of his professional earnings and are not taxable as annual payments under Case III, at least during his lifetime. But, where the author sells his copyright, the price which he receives is part of his professional earnings, and the fees which the purchaser gets from granting licences to publishers are from the beginning taxable as annual payments to him irrespective of whether the author is still practising his profession; they are no part of the author's professional earnings.

In *Stainer's* case (1) the majority of the Court of Appeal held that the payments due after Mr. Howard's death were taxable under Case III as annual payments.

A I think it useful to take some quotations from the judgments because they appear to me to assist in determining what was really decided in that case in this House. SIR RAYMOND EVERSHED, M.R., said (32 Tax Cas. at p. 390):

B “the question in each case must be whether the sums in question, once they have ceased to be capable of taxation under Case II by reason of the fact that the professional man who acquired the right to receive them has died or ceased to exercise his profession, nevertheless have such characteristics as fairly bring them within the compass of the relevant words of Case III.”

SOMERVELL, L.J., said (*ibid.*, at p. 394):

C “Accepting in favour of the executors the commissioners’ view that these sums, if paid, could not, while Mr. Howard was exercising his profession, have been assessed otherwise than under Case II because they were not in his hands ‘pure income profit’ (see *Asher v. London Film Productions, Ltd.* (5), [1944] 1 All E.R. 77), it does not, in my opinion, follow that their nature may not change if the profession has ceased before they become payable and are paid.”

D JENKINS, L.J., dissented, and with regard to his judgment my noble and learned friend, LORD SIMONDS, L.C., said, with the concurrence of all noble Lords present ([1951] 2 All E.R. at p. 1073):

“... I am conscious that I can add little or nothing to the dissenting judgment of JENKINS, L.J., with every word of which I agree.”

E I quote two passages from this judgment (*ibid.*, at p. 1078):

F “It appears to me that the argument for the Crown involves not merely the exercise of an option, but the assertion of a new and distinct liability to tax arising on the discontinuance of the profession with respect to payments on account of the shares of receipts or profits received after such discontinuance. Perhaps the best way of putting the point is to describe the shares of receipts or profits as possessing the dual character of (a) professional earnings and (b) annual payments, the argument being in effect that so long as the profession was carried on their character as earnings precluded their assessment as annual payments under Case III of Sch. D, but that on the discontinuance of the profession this obstacle was removed and the sums in question became thenceforth simply annual payments to which the previously potential but suspended liability to tax under Case III of Sch. D thereupon attached.”

G Having dealt with *Bennett v. Ogston* (2), he noted that the Solicitor-General had argued that the instalments were income earned by the exploitation of the films after Mr. Howard’s death, just as the interest in *Bennett v. Ogston* (2) was income earned after the moneylender’s death by the use of the money lent in his lifetime. He then said, after dealing with the case of an income-bearing asset received as remuneration, a point to which I shall return later (*ibid.*, at p. 1079):

H “... I think it is equally clear that the assessment to tax of the profits of a profession under Case II of Sch. D down to the date of discontinuance is to be taken as covering all remuneration earned in the course of such profession, whether received prior to or after such discontinuance, and that, the liability to tax being thus exhausted so far as remuneration is concerned, nothing which is, in truth, remuneration so earned can afterwards be charged to tax merely because the mode of ascertaining and paying it is such that it might have been charged to tax under some other Case if it had not been remuneration so earned.”

I In this House, my noble and learned friend, LORD SIMONDS, after approving the principle stated by ROWLATT, J., in *Bennett v. Ogston* (2), expressed a doubt

whether that principle was correctly applied in that case—a doubt which I share. A
He then said, with regard to the instalments (*ibid.*, at p. 1074):

“It appears to me wholly irrelevant that they were not payable until after his death and equally so that they were not and could not be quantified until after that event. They retained the essential quality of being the fruit of his professional activity . . . The source of these payments was the professional activity of Mr. Howard. It was never anything else. B
It is true that his remuneration took the form of annual payments which, if other conditions were satisfied, might fall within Case III. But other conditions were not satisfied, for *ex hypothesi* the source of the remuneration was the exercise of a profession falling within Case III.”

In my opinion, the ground of judgment in this House in *Stainer's* case (1) was that payments which are the fruit of professional activity are only taxable under Case II and cannot be taxed under Case III, even when it is no longer possible when they fall due to tax them under Case II, and when looked at by themselves and without regard to their source they would fall within Case III. I am not sure that I fully appreciate the reasons for the decision, but I have no doubt that that is what was decided, and I am bound by that decision whether I agree with it or not. D

The basis on which the Crown seeks to distinguish *Stainer's* case (1) is, if I understood the argument rightly, that, although payments under the agreements in this case had to be treated as falling within Case II and as excluded from Case III so long as Mr. Cheyney was alive, they were not truly the fruit of his professional activity but were truly the fruit of his exploitation of property. I did not understand counsel for the Crown to argue that these payments changed their character when Mr. Cheyney died; his argument was that they never had been the fruit of professional activity. I must confess that I do not understand how a payment which is not truly the fruit of professional activity can fall within Case II at any time. Section 123 (1) of the Act of 1952 provides: E

“Tax under Sch. D shall be charged under the following Cases respectively, that is to say— . . . Case II—tax in respect of any profession or vocation not contained in any other Schedule.” F

I cannot see how “tax in respect of any profession” can be chargeable in respect of a sum which is not the fruit of a professional activity but is the fruit of something else; it appears to me that, once it is established that these payments were properly chargeable under Case II, it necessarily follows that they must be regarded as the fruit of professional activity and, if that is so, this case appears to me to be indistinguishable from *Stainer's* case (1). G

Finally, I think that I ought to examine certain statements in *Stainer's* case (1) about income-bearing assets because the Crown relied on them. JENKINS, L.J., said ([1951] 2 All E.R. at p. 1079): H

“I think it is clear that if, in the course of a profession, an income-bearing asset is received as remuneration, the income produced by that asset after the discontinuance of the profession may be taxed as such, just as the interest accruing after the death of the moneylender was taxed in *Bennett v. Ogston* (2).” I

LORD SIMONDS, L.C., said (*ibid.*, at p. 1075):

“... I can well understand that, if a professional man receives as remuneration for his services the sum of £1,000 2½ per cent. consols and retains them, he will suffer deduction of tax from the interest.”

And LORD ASQUITH OF BISHOPSTONE said (*ibid.*, at p. 1076):

“If Mr. Leslie Howard had stipulated for payment in blocks of shares or bonds, or any other instruments which by their independent vitality

A generate income, the dividends or interest might well have been taxable in the hands of his executors."

To my mind, if a person receives as part of his remuneration an asset which yields income, that income is not the fruit of his professional activity any more than it would be if that person had received his remuneration in money and had then used that money to buy that asset. From the moment when the asset comes into his hands, the source of any income which it yields is that asset and not his professional activities. There would be no question of the income falling under Case II during his life and then being taxable under some other Case after his death. The receipt by a professional man of income yielded by an asset which has been transferred to him is not a method of gaining professional income, whether or not the asset came to him as professional remuneration. But for an author exploitation of his copyright is a method of gaining professional income. Therefore, this matter is of no assistance to the Crown's case. I am of opinion that this appeal should be dismissed.

LORD TUCKER: My Lords, I agree for the reasons which have been stated that this case is indistinguishable from the decision of this House in *Gospel v. Purchase* (1) ([1951] 2 All E.R. 1071; sub nom. *Stainer's Executors v. Purchase*, 32 Tax Cas. 367), and that, accordingly, this appeal should be dismissed.

LORD KEITH OF AVONHOLM: My Lords, in the view that I take of this case any differences in the specimen agreements produced are immaterial. All are agreements giving certain rights to publishers in respect of books written or to be written in return for remuneration by way of royalties (or sums in advance of royalties) on the books when published and sold. Three of the agreements may be regarded as agreements assigning to publishers, under certain conditions, the copyright in certain books written or to be written, and the fourth as conferring rights of translation and publication in French of a book already published in English.

It is conceded that, during his life, Peter Cheyney was assessed to tax on the royalties obtained under these agreements, under Case II of Sch. D, as a person carrying on the profession of author. The question is whether royalties coming in after his death continue to attract tax. In *Gospel v. Purchase* (1) ([1951] 2 All E.R. 1071; sub nom. *Stainer's Executors v. Purchase*, 32 Tax Cas. 367) (hereinafter called "*Stainer's case*"), it was held that the remuneration accruing after death for services given during life as actor and producer did not attract tax, as the profession in respect of which the profits and gains were taxable had ceased at the death. The Court of Appeal, HARMAN, J., and the General Commissioners have all taken the view that this case is governed by *Stainer's case* (1), and that the assessment should be discharged. But this case cannot, I think, be treated as a case of remuneration for services rendered. Some of the agreements relate to books already written, and the others relate to rights to be conferred in books when they come to be written. An author is not, in my opinion, making a contract for services by entering into an agreement for the publication of a book already created by him. The position may approximate to a contract for services where the author binds himself to write a book and to transfer the copyright to a publisher, but I do not find in the agreements here any obligation to write a book. Mr. Cheyney's own interests were, no doubt, sufficient to secure that the book, or books, would be written. I prefer to treat the case from the angle of approach taken by counsel for the Crown that these are agreements relating to property of Mr. Cheyney already in existence or to come into existence.

The case for the Crown, as I understand it, is that the activities of Mr. Cheyney during his life had a dual character. They were the exercise of the profession of an author in writing books and they were at the same time a dealing with the

property in the books so created. During his life, or until his retirement, it was the professional aspect of his activities with which the Revenue was concerned and in respect of which he was taxed. With his death this aspect of the matter terminated, or disappeared, and we are left, it is said, only with property in the shape of the books and copyrights created by him. These, so the argument runs, are income-producing assets, on the income from which tax should be levied as income of property. Thus, during his life, Mr. Cheyney was assessable under Case II of Sch. D, and on his death the royalties from the contracts made by him arising out of the publication of his books were taxable under Case III as annual payments or, alternatively, under Case VI, or, in the case of royalties accruing abroad, under Case V as income from possessions out of the United Kingdom. Counsel for the Crown expressly disclaimed any right of the Revenue to opt between Case II and Case III during Mr. Cheyney's life.

I have reached the view that the contentions for the Crown fall to be rejected. But, first, I would emphasise that we are concerned only with contracts made by Mr. Cheyney. If there are any unexhausted rights in Mr. Cheyney's books which his representatives could turn to account after his death, quite different considerations would arise with which we are not concerned in this case.

I turn, accordingly, to consider what is involved in the professional activities of an author during his life. An author writes generally for profit or in the hope of profit. It is only when they make a profit that any question of assessing him on the profits of a profession can arise. It is only by exploiting the work of his brain and his pen that he can make any professional income. The methods of exploitation may take various forms. He may arrange for publication of his works and retain the profits of sale, after deduction of publishers' and printers' and other expenses, for himself. He may sell the copyright of his works in return for lump sum payments, or for royalties on sales, or for both. He may grant use of his works for translation, for film or stage production purposes, for broadcasting or in other ways. He may accept commissions to produce books on agreed terms. Mr. Cheyney seems to have adopted all these methods, except possibly the first, according to the specimen agreements put before us. In my opinion, whichever of these methods an author adopts, he is doing no more than pursuing his profession with a view to pecuniary profit. It would be absurd to treat his professional activities as at an end with the production of his typescript, or manuscript, and to treat the rest as merely turning property to gain. An author, unlike an artist, necessarily looks to large scale reproduction of his book, and the greater the number of copies sold the greater will be his income if he has retained the rights in his work in his own hands or has sold them on a royalty basis. He may, of course, sell the rights for a lump sum, and history records many instances of an author having thus disposed of the fruits of his labour for a very inadequate sum. In this last example, the sum received will be a receipt of his profession in respect of which he will be taxable. Equally he will be taxable on receipts in the shape of royalties received, or on the profits of publication where he has retained his rights in the book. It is impossible, in my opinion, to treat these receipts differently for income tax purposes according to the form which they take. They are stamped throughout as the receipts from a professional activity, and they do not lose that character on the death of their producer.

In principle, there is no difference between the case where an author sells the copyright and the case where he retains the copyright. What he has produced is not copyright but a book. Copyright is an incident attached by law to the book, fortifying that which he has produced and giving it a value which it would not have if it could be reproduced illegitimately in the shape of pirated editions. The property, then, from which the author obtains his income is the work produced by him, and the method by which that work can be turned to profit

A during his life is in his own hands and is but a projection of his professional activities, the means by which he earns his livelihood from his professional work. If I take the case where he retains the rights in his work and takes the profits to himself, it seems to me clear that, when he dies, any profits that come in afterwards from any issue published during his life are still the profits of what was his profession. It is not possible to say that they are mere income of property, "pure income profit" as it has been called. They are profits not only from writing the book but from bearing all the expenses of selling the book to the public, including the expenses of printing and publishing. They are akin to the profits of a trade, but are more properly called the profits of a profession. So it is, in my opinion, where he sells his rights in return for royalties. It is quite unreal to regard these royalties merely as a return from property. They are the reward for all he has put into his work, his labour, his thought, his skill as a writer and the expenses incurred in creating his book. The position is materially different where rights in a book in return for royalties are granted by another than the author. The elements to which I have referred are entirely absent in such a case. The book is there already made and the idea of royalties as merely the income of property is a more intelligible conception. In Mr. Cheyney's case, the position is, in my opinion, accurately and concisely summed up in the words of JENKINS, L.J., when he says ([1957] 3 All E.R. at p. 399):

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"... it was just as much part of his profession to turn his literary labours to account by licensing the copyright he had created to publishers as it was to write the books in which the copyright subsisted."

E

He was treated by the Revenue as earning money in the exercise of his profession by means of the contracts he made. It is not now said, nor could it, in my opinion, be said, that any change in the character of the payments received took place on his death. What is said is that what was latent became patent when his professional activities ceased on his death. But, for the reasons I have given, there is, in my opinion, no sound ground for this contention.

F

The difficulties in this and similar cases arise from the fact that assessments to tax are made on a receipts basis, instead of an earnings basis. It may be that, in some professions, no more satisfactory basis can be adopted. If the result be, as was suggested, that a large fund of income is thus to go untaxed, the remedy would seem to lie in legislation. This is not a *Stainer's* case (1), but the principle of that case, I think, applies.

G

I would dismiss the appeal.

Appeal dismissed.

Solicitors: *Solicitor of Inland Revenue; Frere, Cholmeley & Nicholsons* (for the taxpayer).

[*Reported by G. A. KIDNER, Esq., Barrister-at-Law.*]

A

Re ROYCE'S WILL TRUSTS.
TILDESLEY v. TILDESLEY AND OTHERS.

[CHANCERY DIVISION (Wynn-Parry, J.), November 5, 1958.]

Will—Attestation—Solicitor attesting—Provision for trustees' remuneration—Provision for solicitor's professional charges—Solicitor appointed trustee subsequent to death of testator—Whether entitled to remuneration or professional charges—Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 15.

By his will dated Apr. 20, 1933, a testator appointed two persons to be his executors and trustees, and the will was attested by the first defendant, a solicitor, and another. By cl. 16 of his will the testator declared that if and so long as his trustees retained any part of his trust fund and received and applied the income, the trustees should pay to themselves five per cent. of such income as remuneration for their services. By cl. 17 the testator provided that any executor or trustee of his will who might be a solicitor should be entitled to charge for his services. On Apr. 22, 1933, the testator died, and on June 6, 1933, the two executors and trustees proved the will. In 1934 one of the trustees died and by a deed of appointment in that year, the first defendant was appointed to be one of the trustees. On a question as to his rights under cl. 16 and cl. 17 of the will,

Held: the first defendant as an attesting witness was disqualified by the Wills Act, 1837, s. 15, from taking any benefit under either cl. 16 or cl. 17 of the will, notwithstanding that he did not enter the class *prima facie* entitled to benefit under those clauses until after the date of the testator's death.

Thorpe v. Bestwick ((1881), 6 Q.B.D. 311) explained.

Re Pooley ((1888), 40 Ch.D. 1) applied.

[As to the attestation of wills and the effect of gifts by will to a witness, see 34 HALSBURY'S LAWS (2nd Edn.) 66, para. 85; and for cases on the subject, see 42 DIGEST 122, 1177, 1178, 44 DIGEST 277, 1101.]

For the Wills Act, 1837, s. 15, see 26 HALSBURY'S STATUTES (2nd Edn.) 1338.]

Cases referred to:

- (1) *Re Pooley*, (1888), 40 Ch.D. 1; 58 L.J.Ch. 1; 60 L.T. 73; 42 Digest 122, 1178.
- (2) *Thorpe v. Bestwick*, (1881), 6 Q.B.D. 311; 50 L.J.Q.B. 320; 44 L.T. 180; 45 J.P. 440; 44 Digest 277, 1101.
- (3) *New South Wales Stamp Duties Comr. v. Pearce*, *Pearce v. New South Wales Stamp Duties Comr.*, [1954] 1 All E.R. 19; [1954] A.C. 91; 3rd Digest Supp.
- (4) *Re Thorley*, *Thorley v. Massam*, [1891] 2 Ch. 613; 60 L.J.Ch. 537; 64 L.T. 515; 21 Digest 52, 345.
- (5) *Re Brown*, [1918] W.N. 118.

Adjourned Summons.

This originating summons was issued by one of the trustees of the will of Sir Frederick Henry Royce, Bart, deceased, for the determination of the following question (among others): whether, having regard to the fact that the first defendant was an attesting witness to the testator's will, the first defendant was entitled as a trustee of the will: (a) to receive remuneration for his services under cl. 16 of the will: or (b) to charge professional remuneration as a solicitor against the testator's estate under cl. 17 of the will.

The first defendant, a solicitor, attested the will which was made on Apr. 20, 1933. On Apr. 22, 1933, the testator died without having revoked or altered his

A will which was proved by the plaintiff and Albert William Claremont on June 6, 1933. By a deed of appointment dated July 16, 1934, the first defendant was appointed trustee to act jointly with the plaintiff. On Aug. 5, 1934, Albert William Claremont died.

The testator provided by his will:

B “ 16. I declare that if and so long as my trustees are retaining any part of the trust fund and receiving and applying the income it shall be lawful for them to pay to themselves out of such income before dividing the same such a sum as shall equal five per cent. thereof to be equally divided between them by way of remuneration for their services.

C “ 17. I declare that Albert William Claremont or any person who may for the time being be an executor or a trustee of my will and who may be a solicitor shall be entitled to charge and shall be paid out of my estate for his services in the same manner as though not being an executor or trustee he had been employed by my executors or trustees to render such services.”

D *H. E. Francis* for the plaintiff, one of the trustees.
Raymond Walton for the first defendant, the attesting witness.
E. I. Goulding for the second defendant, contingently interested in residue.
Denys B. Buckley for the Attorney-General.

WYNN-PARRY, J.: The question with which I have to deal is not an easy one and it is one as regards which, curiously enough, there is no direct authority. The question arises because the first defendant was an attesting witness to the testator's will. On the death of one of the two trustees named in that will he was appointed by the surviving trustee to be a trustee of the will. [HIS LORDSHIP read cl. 16 and cl. 17 of the will and continued:] Having regard to the circumstance that the first defendant attested the will, is he, on becoming a trustee, entitled to receive remuneration under cl. 16 and to make professional charges under cl. 17 or is the circumstance that he attested the will fatal to his right to receive any benefit under either of those clauses? The question turns on the Wills Act, 1837, s. 15, by which, so far as is material, it is provided:

G “ If any person shall attest the execution of any will to whom or to whose wife or husband any beneficial . . . gift . . . shall be thereby given or made, such . . . gift . . . shall, so far only as concerns such person attesting the execution of such will, or the wife or husband of such person, or any person claiming under such person or wife or husband, be utterly null and void . . . ”

Section 15 goes on to provide that the person so attesting shall be admitted as a witness to the proof of the will notwithstanding the gift which the earlier part of s. 15 has made void. That section was substituted for the corresponding section, s. 1, of the Wills Act, 1752. In the Wills Act, 1752, however, there was no reference to the husband or wife of an attesting witness and to that extent the earlier section is extended. The Act of 1752 effected a vital change in the policy of the law because previously the lack of what the statute calls three credible witnesses vitiated the whole will; whereas under what might be called “ the new law ” dating from 1752, the will is to stand, but the gift is to fail.

The real question which emerges can be put this way. It has been held, and the proposition is beyond dispute, that the provision that a solicitor is to be entitled to charge, is a legacy. If a person is named in the will as executor and is a solicitor and the will contains a charging clause, then at all material times he is a member of a class of persons who have the right to make professional charges. However, if he only enters that class after the death of the testator,

but has attested the will, is he within the mischief of s. 15? That appears to me to be a difficult question to answer. A

In *Re Pooley* (1) ((1888), 40 Ch.D. 1) which was a decision of the Court of Appeal a testatrix appointed two named persons, the second of whom was a solicitor, as executors and trustees of her will and declared that any trustee who should be a solicitor should be entitled to make professional charges. The named solicitor was one of the attesting witnesses and it was held by the Court of Appeal, affirming the decision of STIRLING, J., that the solicitor was not entitled to any profit costs for business done by him in relation to the estate. The basis of the decision was that the right to make professional charges could only be claimed under the will and was a beneficial interest under it, from claiming which the solicitor, as an attesting witness, was precluded by s. 15 of the Wills Act, 1837. That is not exactly this case because in that case the solicitor in question was named as an executor and trustee in the will, whereas the first defendant here only became a trustee by appointment after the death of the testator. But it is to be observed that the claim to make professional charges could only have been made under the will. B C

Counsel for the first defendant relies strongly on *Thorpe v. Bestwick* (2) ((1881), 6 Q.B.D. 311), which lays down the proposition that under the Wills Act, 1837, s. 15, the marriage, after attestation of a will, of a devisee to the attesting witness, does not affect the validity of the devise. MATHEW, J., in a short judgment said (*ibid.*, at p. 312): D

"I think the plaintiffs are entitled to judgment. The policy of the Wills Act [1837], in depriving the attesting witness of any legacy given by the document of bequest, is not to allow wills to be proved by the evidence of persons benefited by them, and it makes void any devise to an attesting witness, or to his or her wife or husband. In the present case the plaintiff, at the time when the will was attested, took no benefit under it, but he subsequently married the devisee, and I am asked to hold that the result of this marriage is to destroy the validity of the devise. But there is no such provision in any part of the Act; the only section which could be referred to is s. 24, by which every will is to take effect as if it had been executed immediately before the death of the testator." E F

Counsel for the second defendant submitted that from this case no general principle could be deduced and that only the very limited principle could be deduced from it that it dealt only with the point of time when the position of husband or wife was to be ascertained. G

Counsel for the first defendant against that, drew my attention to the argument of counsel for the defendant in that case, who is reported as having said (*ibid.*, at p. 312): H

"Section 14 of the Act, enacting that if any person who shall attest the execution of a will shall, at the time of the execution or at any time afterwards, be incompetent to prove the execution, such will shall not on that account be invalid—contemplates that the witness may become incompetent after the execution of the will and before the death of the testator. To uphold the present devise would enable an attesting witness who took a devise under the will to secure himself by antedating it." I

I think that I must take the words of the judgment and extract from them what counsel for the second defendant submits, viz., that it is directed simply to considering when a person is to be considered as being wife or husband for the purposes of s. 15 of the Wills Act, 1837.

A My attention was drawn to a passage from the judgment of the Privy Council, delivered by LORD COHEN, in *New South Wales Stamp Duties Comr. v. Pearse*, *Pearse v. New South Wales Stamp Duties Comr.* (3) ([1954] 1 All E.R. 19). LORD COHEN says (*ibid.*, at p. 28):

B “ Their Lordships agree with the majority in the High Court that the decisions to which WILLIAMS, J., refers, and, in particular, the decisions in *Re Thorley*, *Thorley v. Massam* (4) ([1891] 2 Ch. 613) and *Re Brown* (5) ([1918] W.N. 118) lead inevitably to the conclusion that such a provision as cl. 13 [charging clause] confers a gift on the executor and enables him to take out of the assets of the testator something which the law would not otherwise allow.”

C It is perfectly true that the appointment of the first defendant as a trustee has the result of enabling him to take out of the assets of the testator something which the law would not otherwise allow because there is in the will a charging clause. Against that there is to be borne in mind that it is with the proving of a will that, primarily at any rate, s. 15 of the Wills Act, 1837, is concerned.

D There then remains the short, but still difficult, question of the language of s. 15. Has one who attests the will—although he is not in the class which has any beneficial interest either when the will is attested or when the will comes to be proved—any right, if he afterwards enters a class defined by the will, to take the benefits which the provisions of the will seek to confer on that class? I find this a difficult question and I can well imagine that different minds might well take different views, but giving the matter the best consideration I can I come to the conclusion that the only safe view to adopt is that if a man attests a will he should not in any way be enabled to take any benefit under that will—not even if he only enters a class intended to benefit by the will after the will has been proved. There is a good deal to be said for the

E argument which counsel for the first defendant put forward, but it would necessarily in many cases lead to uncertainty and it might in certain cases lead to collusion. For those reasons, therefore, I come to the conclusion that I should declare that the first defendant is not entitled either to receive remuneration for his services under cl. 16, or to charge for professional remuneration under cl. 17.

F

Order accordingly.

Solicitors: *Jaques & Co.*, agents for *Ollard, Ollard & Sessions*, Wisbech (for the plaintiff and second defendant); *Callingham, Griffith & Bate* (for the first defendant); *Treasury Solicitor*.

[*Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.*]

SOUTH AFRICAN DESPATCH LINE v. OWNERS OF THE PANAMANIAN S.S. NIKI.

[QUEEN'S BENCH DIVISION (Diplock, J.), November 12, 13, 1958.]

Shipping—Charterparty—Exceptions—Strikes—Charterers not responsible for delay if intended cargo cannot be provided—Alternative cargoes—Duty of charterers to provide alternative cargo—Reasonable time allowable for its provision—Whether cargo intended for shipment must be identifiable.

A charterparty dated June 3, 1952, provided for loading "a full and complete cargo of lumber and/or timber and/or wood goods and/or wheat in bulk and/or lawful merchandise . . ." at ports in four districts in the Coos Bay/ British Columbia range with alternative rotations of the ports of loading at the charterers' option. By cl. 4 it was agreed that the "charterers shall not be responsible for any delay if the cargo intended for shipment under this charterparty cannot be provided, delivered, loaded or discharged by reason of riots, strikes or lockouts of any class of workmen or stoppage of labour connected in any way with, or essential to the providing, delivery, loading or discharging of the cargo . . ." By June 13, 1952, the charterers had arranged for 540 M'BM lumber to be loaded at Victoria, British Columbia; and on that date it was their intention to load at the following ports in the following sequence, 4,050 tons of wheat at Vancouver, British Columbia, and 540 M'BM lumber at Victoria, British Columbia, completing with lumber at Coos Bay and Portland, Oregon. At that time the possibility of a strike of lumber men in British Columbia was known to the charterers. The strike broke out on June 16 and continued until July 30, 1952. On June 27 the charterers exercised their option for the rotation of loading ports in favour of the rotation mentioned above, but suggested to the owners that they should alter the rotation of loading, so as to begin at Coos Bay, should load wheat instead of lumber at Victoria if the strike continued, and, in that event, should be allowed \$11,000 for loss of revenue and cost of restowing lumber. The suggested alternative was carried out and wheat was loaded in lieu of the 540 M'BM lumber. It was agreed that the issue "whether owners allowed count time lost Victoria because of strike as laytime if vessel loads intended cargo" should be submitted to arbitration, and that if this were answered in the negative the charterers should be allowed \$11,000 by the owners.

Held: as it was the duty of the charterers under this charterparty, since the provision of a cargo of lumber was delayed by the strike, to load an alternative cargo that was not so delayed, the exceptions in cl. 4 only gave the charterers reasonable time within which to provide the alternative cargo, and did not entitle them to keep the vessel waiting at a strike-bound port, without laytime running, until the cargo originally intended could be shipped.

Bunge Y Born Limitada Sociedad Anonima etc. v. H. A. Brightman & Co. ([1925] A.C. 799) applied.

Per CURIAM: the 540 M'BM lumber was an intended cargo within the meaning of the charterparty, though the wood had not been separated and identified.

[As to exceptions protecting a charterer, see 30 HALSBURY'S LAWS (2nd Edn.) 354, para. 534; 439, para. 605 (5); 449, para. 609 (4).]

Case referred to:

- (1) *Bunge Y Born Limitada Sociedad Anonima Commercial Financiera Y Industrial of Buenos Aires v. Brightman (H. A.) & Co.*, [1925] A.C. 799; 94 L.J.K.B. 840; 133 L.T. 738; *affg.* S.C. sub nom. *Brightman & Co. v. Bunge Y Born Limitada Sociedad*, [1924] 2 K.B. 619; 41 Digest 442, 2776.

A Special Case.

This was an award of an umpire stated in the form of a Special Case at the instance of the respondents in an arbitration between the charterers (the claimants), the South African Despatch Line, and the owners of the Panamanian s.s. Niki, wherein the charterers claimed that they were entitled to have released to them a sum of \$11,000 held in escrow. By an agreed statement of facts the following facts, among others, were agreed for the purposes of the arbitration. The charterparty between the parties to the arbitration was entered into on June 3, 1952. On June 13, 1952, the charterers booked 540 M'BM lumber for shipment at Victoria, British Columbia. On that day it was the intention of the charterers to load cargo on the Niki as follows, 4,050 tons of wheat at Vancouver, British Columbia, the 540 M'BM lumber at Victoria, British Columbia and other lumber at Coos Bay, Oregon, U.S.A., and thereafter at Portland, Oregon, U.S.A. On June 16, 1952, a strike of lumber men broke out in British Columbia, which prevented the loading of timber in British Columbian ports, but did not affect any U.S.A. ports or the loading of wheat or other lawful merchandise at any British Columbian or U.S.A. port. The strike lasted until July 30, 1952. The Niki loaded 4,900 tons of wheat at Vancouver, lumber at Coos Bay and lumber at Portland. In paying freight \$11,000 were deducted and placed in escrow on an undertaking to produce the amount when instructed by the arbitrators.

The umpire found that on June 13, 1952, the date of the contract between the charterers and the shippers for the loading and carriage of the 540 M'BM lumber at Victoria, the charterers must be deemed to have had knowledge that the strike was probable, but not that it was inevitable; and that if the 540 M'BM lumber had been loaded cl. 4 of the charterparty would in the circumstances have protected the charterers from responsibility towards the owners for any delay in the loading thereof caused by the strike, and the owners would not therefore have been able to count time lost because of such strike as laytime if the vessel had loaded the lumber.

Subject to the opinion of the court on the point of law next stated, the umpire awarded that the charterers were entitled to the \$11,000. The question of law for the opinion of the court was whether on the facts agreed and found the charterers were entitled to the \$11,000 placed in escrow.

M. R. E. Kerr for the charterers, the claimants.

R. A. MacCrimmon for the owners, the respondents.

DIPLOCK, J.: This is a Case Stated by an umpire arising out of the lumber strike in British Columbia in 1952. It raises a neat point of construction as to an exceptions clause in a charterparty. The charterers are the claimants in the arbitration, the South African Despatch Line, and the respondents are the owners of the Panamanian vessel Niki. I shall call them "charterers" and "owners" throughout.

The charterparty was entered into on June 3, 1952. It was a single voyage charter on a lump sum freight, and provided for shipment in four districts

"in Coos Bay/British Columbia Range within British Institute Warranty limits (with certain exclusions) maximum six berths; as ordered by charterers, loading rotation to be North/South or South/North at charterers' option, with charterers' option of commencing loading on the Columbia River or Coos Bay, then British Columbia, thence South to Columbia River to complete."

Then there were alternatives giving a very wide range of alternative rotations. The range having been completed, the charterparty goes on: "(orders for first loading place to be given by wireless on captain's application four days before due off Estevan wireless station)". The cargo to be loaded is "a full and complete cargo of lumber and/or timber and/or wood goods and/or wheat in

bulk and/or lawful merchandise"; then there is an exclusion of dangerous cargo, and there is a provision for shipment to "four safe ports in Cape Town/Lourenço Marques range." It was therefore a voyage charter with a wide possibility of variations of port of loading, and one which entitled the charterer to load a great variety of cargo, including all lawful merchandise. A

Clause 4 is the exceptions clause, which I will not read at this moment because I shall have to deal with it in greater detail at length. The only other clauses to which I need refer are cl. 7, which provides that "cargo is to be loaded in fourteen weather working days . . . laydays at first loading port to commence twenty-four hours . . . after receipt of . . ."—and provides for notice of readiness to load, and contains similar provisions for subsequent loading ports. Clause 8 provides for twenty-five days' discharging time, and cl. 9 that loading and discharging time are to be reversible. Clause 23 provides for laydays—"Laydays not to commence before . . . June 25"—and the cancelling date, if the vessel was not ready to load, was July 19. Clause 32 was an arbitration clause which provided that the arbitration should be in London, that the arbitrators should be "not lawyers, and no members of the legal profession to be present", and there is the usual provision for an umpire. B C

On June 13 the charterers had made arrangements for certain cargo to be loaded, and their intention on June 13 was as follows (as set out in the agreed statement of facts): Load at Vancouver, British Columbia, 4,050 tons of wheat, at Victoria, British Columbia, 540 mille lumber, and at Coos Bay, Oregon, and thereafter at Portland, Oregon, to complete with lumber from two shippers, who were, I think, both subsidiaries of, or connected with, the charterers. At that time, on June 13, it was probable but not inevitable, as found by the umpire, that a strike affecting the loading of lumber in British Columbian ports would break out shortly after June 14, and the umpire has found that the charterers must be deemed to have knowledge of that. It was not known, however, and the charterers did not know, how long the strike was likely to last. So the position was that at that date they knew that it was probable, but they did not know that it was inevitable, and they had no knowledge of its likely duration. D E F

On June 27, 1952, the charterers exercised their option of using the vessel in the rotation which I have indicated, namely, first Vancouver for wheat, second Victoria for lumber, and thereafter Coos Bay and Portland; but, in view of the position of the strike on that day they made a suggestion to the owners proposing a variation to the rotation which they would be prepared to adopt. This was in the following terms: G

"Present itinerary 4,050 tons wheat Vancouver B.C. 540 lumber Victoria thence Coos Portland. 540 mille Victoria subject indefinite delay account Canadian mill strike therefore we make owners following proposal. Will commence Coos first loading district then British Columbia completing Portland. If 540 M. Victoria still unready due strike will take 4,900 tons wheat provided owners allow \$11,000 for loss revenue and cost restowing lumber." H

The charterers' contention at that time was that the exceptions clause would entitle them, if they so insisted, to send the vessel to Victoria and there to wait until such time as the strike ended and the lumber could be loaded. The owners' contention was that if the vessel was sent to Victoria to load lumber the laydays would run irrespective of the strike. Those two contentions having been put forward, the owners' alternative rotation and alternative cargo was adopted, and the alternative cargoes suggested there were carried. In the meantime the \$11,000 which was referred to in the telegram to which I have referred, was held in escrow to abide the result of an arbitration on terms which I shall have to look at later. I

Just to finish the record of the relevant facts, notice of readiness was given on July 2, loading of the vessel was completed at Portland in accordance with

A the alternative rotation on July 30, 1952, and the strike ended in British Columbia on that date. The loading time in fact taken was fifteen days and thirteen hours.

B Now the question which party is entitled to the \$11,000 depends in the first instance on the true construction of the exceptions clause in the charterparty. I need not read the first sentence, which is the ordinary provision for excepted perils; the clause goes on:

C "Charterers shall not be responsible for any delay if the cargo intended for shipment under this charterparty cannot be provided, delivered, loaded or discharged by reason of riots, strikes or lockouts of any class of workmen or stoppage of labour connected in any way with, or essential to the providing, delivery, loading or discharging of the cargo, or by reason of floods, fire, ice, frosts, fogs, bad weather, and all accidents or hindrances or other cause or causes beyond the control of shippers or receivers which may prevent or delay the providing, delivery, loading or discharging of the cargo, including all accidents to piers, mines, mills, factories or machinery, railway and canal stoppages and hindrances, political disturbances, insurrections or interventions of constituted authorities."

D In construing that exceptions clause, it seems to me that I have to construe it in the light of four propositions of law. The first is that prima facie it is the duty of the charterer to have the cargo ready to start loading at the commencement of the laydays: secondly, in an exceptions clause providing for interruption of laydays for excepted perils, prima facie this relates to excepted perils which affect the actual operations of loading, not perils which affect merely the provision of the cargo or its transport to the loading place; thirdly, where a charterparty permits loading of a selection of different cargoes, the fact that the exceptions clause would excuse delay in loading one type of cargo does not excuse a failure to load an alternative type of cargo, the loading of which is not affected by an excepted peril; fourthly, in such a case, the exceptions clause does excuse delay in loading for such time as is reasonably required for the charterers to make arrangements to obtain and make ready for loading an alternative type of cargo.

F I do not think that it is necessary for me to refer to any other authorities for these propositions of law than *Bunge Y Born Limitada Sociedad Anonima Commercial Financiera Y Industrial of Buenos Aires v. H. A. Brightman & Co.* (1) ([1924] 2 K.B. 619 in the Court of Appeal) ([1925] A.C. 799 in the House of Lords). The decision in the House of Lords is authority for propositions two and three; the decision in the Court of Appeal is authority for proposition four; although in the House of Lords LORD DUNEDIN indicated that he was not satisfied that that part of the decision of the Court of Appeal, which is the authority for proposition four, might not require examination at some time by their Lordships' House. It is, however, binding on me, and, if I may say so, with respect, I also think that it is right. Now those, as it seems to me, are the relevant propositions of law which should form the background of the construction of the exceptions clause, which, like so many clauses in charterparties, succeeds at the same time in being elliptical, tautologous and ungrammatical, but I must do my best with it. First, as regards the ellipsis,

I "Charterers shall not be responsible for any delay if the cargo intended for shipment under this charterparty cannot be provided . . . by reason of . . . strikes."

It seems to me that this must be construed as "the charterers shall not be responsible for any delay in performing their duties as respects providing a cargo ready for loading", because it is a charterers' responsibility which is referred to, and the charterers' responsibility in relation to loading.

"The charterers shall not be responsible for any delay in performance of their duties in providing a cargo ready for loading, if the cargo intended for shipment cannot be provided by reason of strikes."

It seems to me that, as counsel for the owners has pointed out, this relates to causation of delay, and that the words must mean "so far as delay is caused, or to the extent that the delay is caused by"—and then the excepted perils or circumstances which follow, and the relevant excepted circumstance is "cargo intended for shipment cannot be provided for loading by reason of strikes". Now what is the delay in the performance of the duties of the charterers resulting from the inability to load the intended cargo? That involves considering what are their duties as to providing cargo and, as I have already indicated, under this charterparty they were under a duty to provide any number of alternative cargoes. If, therefore, the particular cargo in this case, timber, could not be provided, they were under a duty to provide another. Their inability to provide the intended cargo may result, and would result, in their having a reasonable time to make alternative arrangements to provide another cargo. That, and that only, is the extent of the delay caused by a strike affecting only one of the alternative cargoes which the charterer is entitled, and indeed under a duty, to supply. In this case the strike affected only timber or lumber. It did not affect wheat or any other of the cargoes concerned.

Counsel for the charterers has contended that I should read the clause as entitling the charterers to wait with their arms folded until the strike ended and make no effort to obtain an alternative cargo, and he suggested to me that the purpose of using the words "if the cargo intended for shipment under this charterparty cannot be provided", as opposed to the words "if the cargo cannot be provided", was for the purpose of overruling or getting rid of the effect of the decision in *Bunge Y Born, etc. v. H. A. Brightman & Co.* (1). He says that no other purpose can account for the use of the clause in its present form. It seems to me that the reason for the clause in its present form can easily be accounted for, because it was intended to overcome the general rule that excepted perils affecting the providing or transport of the cargo as opposed to loading do not come within the ordinary clause. It is to be observed that the words are: "the cargo intended for shipment under this charterparty cannot be provided, delivered, loaded or discharged by reason of"—the various perils. So the clause was necessary to get over what I referred to as the second proposition of law relevant to this case. It was also necessary to define the extent to which interference with provision or loading should bring it within the clause, and to define it very sensibly by limiting it to the cargo which it was the intention of the charterer to load. In other words, it was to give him a reasonable time to make provision for other arrangements, when the provision he had already made, that is to say, the intended cargo, "fell through" because of the excepted peril.

I think, therefore, that on the true construction of the clause, if this vessel had gone to Victoria, as the charterers were entitled to send it, they would not have been entitled, as they claimed, to sit with folded arms and keep it there and hold it until the strike ended on July 30. They would have been entitled to send it there, or it would have been their duty to make alternative arrangements. It would have been their duty to make preliminary arrangements before they sent the vessel there, if there was a reasonable likelihood of the strike going on or continuing when the vessel arrived, or to make definite arrangements as soon as it was clear that the strike would continue. They were being limited, therefore, to a reasonable time to make those arrangements, but to nothing more.

That being my view as to the construction of the charterparty, a question, which I must say I find more difficult, is the proper construction of the agreement to arbitrate. The matter which depends on this arbitration is the destination

A of the \$11,000. It is apparent, when one looks at the documents which
passed between the parties, and indeed when one looks at the Special Case,
that the contentions of the parties until the lawyers were allowed within one
hundred miles of it, was, on the one hand, that the charterers said—"We
are entitled to wait all the time"—and the owners said—"You are not entitled
to wait at all". It did not occur to anyone that there might be a half-way
B house, or a quarter or a tenth-way house (which I think is the more likely figure
at which to put it). I must turn straight away to a telegram on July 6, 1952,
which sets out the issues which it was proposed to submit to arbitration. The
parties had made their various contentions in the previous telegrams, the
original proposal being that the owners should make the variation in their
rotation and the cargoes which I have already indicated, and could deduct
C from the freight the sum of \$11,000 for loss of revenue in cost of restowing
the lumber. In subsequent telegrams the two parties set out their contentions,
as I have already indicated. Then on July 6, there comes the most important
one from the charterers to the owners. It reads as follows:

D "We without prejudice propose to submit to arbitration the issue
whether owners allowed count time lost Victoria because of strike as laytime
if vessel loads intended cargo. If owners' contention correct owners
should not compensate charterers for alternative cargo and cost rearranging
rotation if owners' contention wrong owners to pay for expense of bagging."

Subsequent arrangements were that, instead of there being payment of the
exact sum of the cost of bagging, the \$11,000, which is at present in escrow,
E should be released to the charterers if the issue was decided in their favour,
and if otherwise should be released to the owners.

The issue therefore is this: "Whether owners allowed count time lost Victoria
because of strike as laytime if vessel loads intended cargo". That seems to
me to involve that the arbitrators and the umpire and I are deciding a hypo-
thetical question, because it did not in fact happen. The hypothesis which we
F have to make is that the vessel went to Victoria, that it stayed there until the
end of the strike, and then loaded the intended cargo—the timber. On that
hypothesis we have to answer the question whether the owners would have been
allowed to count the time during which the strike continued as laytime. As
I have indicated, I think that on the true construction of the clause, it may
well be that, had the vessel in fact gone to Victoria, the charterers might have
G been able to make out a case for counting some short period, some reasonable
time to enable them to obtain an alternative cargo, or possibly a reasonable
time for them to consider the possibilities of the strike ending more quickly
than an alternative cargo could be obtained. I am clear, however, that, in
order to take advantage of the exceptions clause in the only way that it is possible
that they could have taken advantage of it, it would be necessary for them to
H show that they had made attempts to obtain an alternative cargo, or, alter-
natively, that they had considered the question whether the strike would end
before that could be done. I do not think that they could have brought them-
selves within the exceptions clause without being in a position to show that they
had taken that course of action. The question as put, namely, "if vessel
loads intended cargo", requires me to assume that the charterers took their
I stand on the contention they had put forward, that they were entitled to do
nothing but wait for the strike to end, and that accordingly, in answering this
question, I am to assume that the charterers could not bring themselves within
the exceptions clause in the way which I have indicated as the only way in
which they could do it.

The question is difficult and I feel a little uneasy about the proper construction
of this document. I think, on the whole, that the answer to the question as
put is that the owners' contention is right, and that accordingly the sum of
\$11,000 ought to be released to the owners, the respondents in the arbitration.

[Counsel for the charterers asked HIS LORDSHIP to deal with the allegation that the charterers were not entitled to send a vessel to a strike-bound port, and secondly, with the point that this was not an "intended" cargo because it was not identified.] A

DIPLOCK, J.: It was contended by counsel for the owners, although I did not, in the view that I took of the construction of the charterparty, have to deal with it, that the charterers were not entitled to send the vessel to a strike-bound port when they knew that there was a strike in progress. I do not think that that is a good contention. A strike being something which may end at any time, a charterer is entitled to continue to exercise his right under the charterparty to send the vessel to a strike-bound port in the hope and expectation that the strike will be over when he gets there. He does not therefore bring himself out of the exceptions clause by doing so. The safeguard of the owners in such a case, in the view that I have taken of this exceptions clause, is that, having sent the vessel to a strike-bound port, it is the charterer's duty to obtain an alternative cargo if, when he gets there, the strike-bound cargo is not available. I apprehend that in considering what is a reasonable time to obtain an alternative cargo one would take into consideration that, in sending the vessel to a strike-bound port, knowing that the strike was on, it would be reasonable of him to make in advance preliminary arrangements for obtaining a cargo if the strike does continue when he gets there. There will thus be no great encouragement for charterers to send vessels to strike-bound ports. B C D

The other matter with which I did not deal, because I have decided the case in favour of counsel for the owner on other grounds, was the contention that the 540 mille of lumber with which we have been dealing here was not an intended cargo, because it was not identified in the sense that it had been separated out and marked for shipment in the Niki, that is to say, it was not identified in any way. I had better complete, having said that, the rest of the agreed facts as to this: E

"It is not customary to separate, mark or identify lumber for loading in any particular vessel until shortly before the lumber is in fact loaded on the vessel, and there would have been no difficulty or delay about the loading of the 540 mille lumber if the said strike had not occurred." F

Counsel for the owners, as I understood his argument, contended that the lumber could not be an intended cargo until it was identified in some way or other and separated out as being a cargo of particular timber destined for that vessel. That consideration seems to me to be appropriate when considering matters of passing the property in the sale of goods. When, however, I find in a charterparty a reference to "intended cargo", I think that a commercial man who read that, though he might not think that the exceptions clause meant what I now have found it to mean, would at least feel that intended cargo covered the cargo in this case which had been booked. G H

Question of law submitted to arbitration answered in the negative; \$11,000 to be released to the owners.*

Solicitors: *Botterell & Roche* (for the claimants, the South African Despatch Line); *Stokes & Mitcalfe* (for the respondents, the owners of the Panamanian s.s. Niki). I

[Reported by E. COCKBURN MILLAR, Barrister-at-Law.]

* This is printed at p. 595, letter D, ante; cf., p. 595, letter I, and p. 591, letter F, ante.

A B. S. LYLE, LTD. v. ROSHER AND OTHERS.

[HOUSE OF LORDS (Viscount Kilmuir, L.C., Lord Morton of Henryton, Lord Reid, Lord Cohen and Lord Keith of Avonholm), October 2, 6, 7, 8, 9, 13, November 25, 1958.]

Mortgage—Priority—Apparent owner charging fund—Appointment of settled fund so that investments could be deposited at Lloyd's by underwriter—Trusts declared by deed in relation to investments deposited—Investments subject by the deed of appointment to trusts of settlement in priority to interests of underwriter under deed declaring trusts—Charge of interest of underwriter under deed declaring trust to secure repayment of money lent to him—Priority as between chargee and trustees of settlement—Rule in Dearle v. Hall.

Under a settlement dated Mar. 2, 1927, A.W. and his father had a power of appointment, which they exercised by a deed dated Feb. 13, 1933, to which the then trustees of the settlement were parties. By the deed of appointment it was recited that, in order to enable the conditions incidental to A.W.'s admission as an underwriting member of Lloyd's to be complied with, the appointors desired to exercise their power of appointment, and it was provided that specified investments should thereafter be held on trust that the trustees of the settlement should forthwith transfer the said investments into the name of Lloyd's to the intent that the said investments should be held by Lloyd's on the trusts of trust deeds which had already been prepared and which were intended to provide respectively for the Lloyd's non-marine deposit and the Lloyd's marine deposit of A.W. It was further provided by the deed of appointment that, in so far as under the said trust deeds the trust fund (i.e., the specified investments) was directed or ought to be held on trust for A.W. or on trust for him, his executors, administrators or assigns, or to repay the trust fund to him or them, the trust fund and the income thereof "shall be deemed, subject as is next hereinafter provided, to be subject to the trusts powers and provisions to which" under the said settlement the same would have been subject if the deed of appointment had not been executed. The deed of appointment further provided that "Lloyd's shall not be affected . . . with notice of any of the trusts powers and provisions" of the said settlement "and shall be entitled to treat the trusts expressed in favour of [A.W.] his executors administrators and assigns in the [said trust deeds] as being operative according to their tenor and so that the receipt of [A.W.] his executors administrators or assigns shall be a sufficient discharge to Lloyd's in respect of the trust fund . . . or any income arising therefrom". The investments were transferred by the settlement trustees to Lloyd's as trustees of the trust deeds which were executed, and A.W. became an underwriting member of Lloyd's. The trust deeds contained ultimate trusts in favour of A.W., his executors, administrators and assigns. In 1951 A.W. borrowed money from licensed moneylenders, agreeing to pay interest at seventy-five per cent. In September, 1952, A.W. was in default and the moneylenders commenced proceedings against him in respect of the loan. By a charge dated Feb. 9, 1953, A.W., in consideration of the moneylenders' agreeing to delay further proceedings in the action, purported to charge the investments transferred by the settlement trustees to Lloyd's with the payment to the moneylenders of the sums due to them and costs. In 1953 A.W. borrowed a further sum from the moneylenders and again purported to charge the investments deposited with Lloyd's with repayment of the sum advanced and interest. Immediately before taking their first charge, and also immediately before taking their second charge, the moneylenders inquired of Lloyd's whether Lloyd's had notice of any other charge, and on each occasion they were informed that Lloyd's had not. At

the time of taking their charges the moneylenders had no notice of any other interest in the investments deposited at Lloyd's than that of Lloyd's and that of A.W. In 1954 A.W. became bankrupt, and the moneylenders claimed that their charges ranked in priority to any interest of the settlement trustees in the investments in the hands of Lloyd's.

Held: the moneylenders were not entitled to priority because the appointments conferred no beneficial interest on A.W. in the investments, which remained subject to the trusts of the settlement of 1927 except so far as they were varied by the deed of appointment of 1933; accordingly, A.W. had never been able to create a charge on the investments ranking in priority to the interests of the settlement trustees, and the rule in *Dearle v. Hall* ((1828), 3 Russ. 1) concerning the priority of competing assignments of equitable interests had no application.

Redfearn v. Somervail ((1813), 1 Dow. 50; 5 Pat. App. 707) distinguished. Appeal dismissed.

[As to priority as between mortgagees of personalty, see 23 HALSBURY'S LAWS (2nd Edn.) 539, para. 792.

As to the rule in *Dearle v. Hall*, see 4 HALSBURY'S LAWS (3rd Edn.) 499, para. 1029, and 14 HALSBURY'S LAWS (3rd Edn.) 575, para. 1068; and for cases on the subject, see 8 DIGEST (Repl.) 599-601, 430-445.]

Cases referred to:

- (1) *Dearle v. Hall*, *Loveridge v. Cooper*, (1828), 3 Russ. 1; 38 E.R. 475; 8 Digest (Repl.) 599, 430.
- (2) *Ward v. Duncombe*, [1893] A.C. 369; 62 L.J.Ch. 881; 69 L.T. 121; 8 Digest (Repl.) 592, 367.
- (3) *Redfearn v. Somervail*, (1813), 1 Dow. 50 (3 E.R. 618); 5 Pat. App. 707; 8 Digest (Repl.) 605, 212.
- (4) *Heritable Reversionary Co., Ltd. v. Millar*, [1892] A.C. 598; 5 Digest 697, 6133 *iii*.
- (5) *Shropshire Union Railways & Canal Co. v. R.*, (1875), L.R. 7 H.L. 496; 45 L.J.Q.B. 31; 32 L.T. 283; 35 Digest 464, 2017.
- (6) *Re King's Settlement*, *King v. King*, [1931] All E.R. Rep. 692; [1931] 2 Ch. 294; 100 L.J.Ch. 359; 145 L.T. 517; Digest Supp.
- (7) *Abigail v. Lapin*, [1934] All E.R. Rep. 720; [1934] A.C. 491; 103 L.J.P.C. 105; 151 L.T. 429; Digest Supp.
- (8) *Hill v. Peters*, [1918] 2 Ch. 273; 87 L.J.Ch. 584; 119 L.T. 613; 8 Digest (Repl.) 601, 445.
- (9) *Re Dallas*, [1904] 2 Ch. 385; 73 L.J.Ch. 365; 90 L.T. 177; 8 Digest (Repl.) 591, 358.
- (10) *North British Ry. Co. v. Lindsay*, (1875), 3 R. (Ct. of Sess.) 168.

Appeal.

Appeal by the plaintiffs from an order of the Court of Appeal (JENKINS and SELLERS, L.J.J., and UPJOHN, J.) dated June 5, 1957, affirming an order of WYNN-PARRY, J., dated Nov. 1, 1956. WYNN-PARRY, J., dismissed the action in which the plaintiffs claimed a declaration that two charges dated respectively Feb. 9, 1953, and Mar. 24, 1953, given by one Algernon George Henry Willis in favour of the plaintiffs charging his interest in funds held by Lloyd's ranked in priority to any interest of the first and second defendants, the trustees of a resettlement dated Mar. 2, 1927, made between Harry William Morgan Willis of the first part, his elder son the said Algernon George Henry Willis of the second part, and trustees, namely, the said Harry William Morgan Willis, the respondents John Benchley Rosher and Frederick James Mann, and one Clifford Thomas Steward of the third part. The first and second defendants counter-claimed for a declaration that certain of the said funds and the income thereof were subject to the trusts of the said settlement in priority to any claim of the

A plaintiffs or of the trustee in bankruptcy of the said Algernon George Henry Willis. WYNN-PARRY, J., made the declaration claimed by the first and second defendants.

The provisions of the said settlement of Mar. 2, 1927, which was made in exercise of joint power of appointment conferred on the first and second part by a disentailing assurance, were, so far as material, that certain real estate and
B investments were held on such trusts and in such manner generally as they should jointly appoint by deed and in default of and until and subject to any such appointment on trust to pay to the said Algernon George Henry Willis (hereinafter called "the bankrupt") during the joint lives of himself and his father a yearly rentcharge therein mentioned, and subject thereto in trust for the father during his life with remainder in trust for the bankrupt during his life with
C remainder in trust for the bankrupt's sons successively in tail general with divers remainders over. The father died on May 31, 1936. The bankrupt was adjudicated bankrupt on Mar. 4, 1954. The writ commencing the present action was issued on Aug. 25, 1954.

Milner Holland, Q.C., and *A. L. Figgis* for the appellants, B. S. Lyle, Ltd.

Lionel Edwards, Q.C., and *Sir Norman G. Touche* for the first and second
D respondents, the trustees of the settlement of 1927.

The third and fourth respondents did not appear and were not represented.

The House took time for consideration.

Nov. 25. The following opinions were read.

VISCOUNT KILMUIR, L.C.: My Lords, this is an appeal from an order
E of the Court of Appeal affirming a judgment of WYNN-PARRY, J. The appellants were plaintiffs in proceedings in the Chancery Division; the first and second-named respondents to this appeal are the trustees of a resettlement dated Mar. 2, 1927, made between Harry William Morgan Willis and Algernon George Henry Willis, whom I shall call "the father" and "the bankrupt" respectively. The third-named respondents (whom I shall call "Lloyd's") are the society
F incorporated by Lloyd's Act, 1871, under the name of Lloyd's. The fourth-named respondent is the trustee of the property of the bankrupt who was adjudged bankrupt on Mar. 4, 1954. The question which arose for decision in the action and arises for decision in this appeal is whether certain charges created in favour of the appellants by the bankrupt on funds standing in the name of Lloyd's rank in priority to the interest therein of the settlement trustees.

G In the year 1933 the bankrupt was desirous of becoming an underwriting member of Lloyd's. To qualify him for membership, it was necessary that approved investments of sufficient value should be vested in Lloyd's on trusts for securing the due discharge of the bankrupt's underwriting obligations, separate trust funds being required to be so constituted for non-marine and marine underwriting respectively. In order to provide these investments, the father and
H the bankrupt, as they had power to do under the settlement dated Mar. 2, 1927, executed a deed of appointment and release to which the then settlement trustees were parties, dated Feb. 13, 1933. The appointment of 1933, after various recitals, including recital C which says that:

"in order to enable the conditions incidental to [the bankrupt's] admission as an underwriting member of Lloyd's to be complied with, the
I appointors are desirous of exercising the joint power of appointment conferred on them by the settlement [that is, the resettlement of 1927] to the extent and in the manner hereinafter appearing",

provided that certain investments should thereafter be held

"(I) Upon trust that the trustees of the settlement shall forthwith transfer the said investments into the name of Lloyd's to the intent that the said investments shall henceforth be held by Lloyd's

"(a) as to [certain of the investments] and the property from time to

time representing the same (all of which are hereinafter together called the non-marine deposit), upon the trusts and for the purposes and subject to the powers provisions and discretions upon for and subject to which, under a trust deed (hereinafter called the non-marine trust deed) which is intended to provide for the Lloyd's non-marine deposit of the said Algernon George Henry Willis and has already been prepared and is expressed to be made between the [bankrupt] of the one part and Lloyd's of the other part and is intended to bear even dates with these presents, the non-marine deposit ought to be held from time to time."

There followed (b) which dealt with the marine trust deed and constituted the marine deposit in exactly similar terms. It was further provided by the appointment of 1933 as follows:

"(II) Provided that in so far as, under the non-marine trust deed and the marine trust deed respectively, the trust fund is directed or ought to be held upon trust for the [bankrupt] or upon trust for him his executors administrators or assigns or upon trust to retransfer or repay the same to him his executors administrators or assigns or as he or they may direct or otherwise upon trust for him absolutely, and in so far as, under the non-marine trust deed and the marine trust deed respectively, the annual income of the trust fund is directed to be paid to the [bankrupt] his executors and administrators or assigns or as he or they shall direct, the trust fund and the income thereof respectively shall be deemed, subject as is next hereinafter provided, to be subject to the trusts powers and provisions to which, under the settlement, the trust fund and the income thereof respectively would have been subject if these presents had not been executed.

"(III) Notwithstanding anything in the last preceding proviso contained, Lloyd's shall not be affected or deemed to be affected with notice of any of the trusts powers and provisions lastly hereinbefore referred to and shall be entitled to treat the trusts expressed in favour of the [bankrupt] his executors administrators and assigns in the non-marine trust deed and the marine trust deed as being operative according to their tenor and so that the receipt of the [bankrupt] his executors administrators or assigns shall be a sufficient discharge to Lloyd's in respect of the trust fund or any part thereof or any income arising therefrom."

The non-marine trust deed and the marine trust deed bearing even date with the appointment of 1933 (that is Feb. 13, 1933) were duly executed, and the investments designated by the appointment of 1933 were duly transferred by the then settlement trustees to Lloyd's as trustees of the non-marine and marine trust deeds respectively, and the bankrupt duly became an underwriting member of Lloyd's. Both the non-marine trust deed and the marine trust deed, after a number of trusts and provisions mainly for securing the payment of claims on policies underwritten by the bankrupt, contained ultimate trusts in favour of the bankrupt, his executors, administrators or assigns.

By a deed of appointment and release (which I shall call "the appointment of 1934") made between the same parties as the appointment of 1933 and dated June 14, 1934, it was provided that certain further funds might be transferred by the settlement trustees to Lloyd's to be held by them on the trusts of the non-marine trust deed. The material provisions of the appointment of 1934 were the same as those of the appointment of 1933. Pursuant to the appointment of 1934, the settlement trustees in 1938 and 1939 transferred into the name of Lloyd's certain further stocks. In 1939 the bankrupt himself transferred into the name of Lloyd's £941 four per cent. Consolidated Stock to be held on the trusts of the non-marine trust deed. In November, 1951, the bankrupt borrowed from the appellants, who were licensed moneylenders, the sum of £3,000 carrying interest at the rate of seventy-five per cent. per annum; in September, 1952, he was in default and the appellants commenced proceedings against him in respect

A of this loan and interest. By a charge (which I shall call "the first charge") dated Feb. 9, 1953, the bankrupt, in consideration of the appellants agreeing to delay all further proceedings in that action, charged, or purported to charge, £8,581 3½ per cent. War Stock deposited with Lloyd's with the payment to the appellants of the principal, interest and costs claimed by the writ in the action. This sum of £8,581 3½ per cent. War Stock in fact represented, by reason of
B changes of investment made by Lloyd's, the whole of the investments transferred by the then settlement trustees to Lloyd's under the appointment of 1933 and the appointment of 1934. On Mar. 24, 1953, the bankrupt borrowed from the appellants a further sum of £2,500 carrying interest at seventy-five per cent. per annum, and by a charge of the same date (which I shall call "the second charge"), he charged, or purported to charge, the £8,581 3½ per cent. War Stock and £941
C four per cent. Consols deposited with Lloyd's with the repayment to the appellants of the £2,500 and interest, subject as to the War Loan to the first charge.

Immediately before taking the first charge and immediately before taking the second charge, the appellants, by their solicitors, inquired of Lloyd's whether Lloyd's had notice of any other charge on the stocks comprised in the first charge and the second charge respectively, and on each occasion were informed
D by Lloyd's that they had not. At the time when they took the first charge and at the time when they took the second charge, the appellants had no knowledge of any other charge, assignment or interest of or in the stocks other than the interests of Lloyd's and of the bankrupt.

The appellants claimed in the action a declaration that the first charge and the second charge rank in priority to any interest of the respondent trustees in the stocks in the hands of Lloyd's. The settlement trustees, by their defence
E and counterclaim, counterclaimed for a declaration that, subject to the prior trusts in favour of Lloyd's, they were entitled to these stocks (other than the £941 four per cent. Consols to which they made no claim) in priority to any claim of the appellants.

The appellants contended that the case was one of competing equitable interests in which priority was to be decided by an application of the rule in *Dearle v. Hall*, *Loveridge v. Cooper* (1) ((1828), 3 Russ. 1). They claimed that the appointments of 1933 and 1934, on their true construction, were, in the first place, an appointment to the debtor of the equitable beneficial interest in the investments transferred to Lloyd's subject to the trusts for securing the due performance of his underwriting obligations, and, secondly, an assignment by the debtor of such
F interest to the trustees of the settlement of 1927. Even if there was not an instant of time when the bankrupt had the beneficial interest, it was urged (a) that the documents did confer on the bankrupt the right as between himself and Lloyd's (subject to underwriting claims) to receive the investments and that this was a chose in action as against Lloyd's which he held on trust for the trustees of the settlement; (b) that the bankrupt carried out successive
G dealings with that chose in action, that is to say, his being constituted trustee for the respondent trustees and his charging the chose, and (c) that these successive dealings created competing equities in the trustees and the appellants, the priority of which depended on the priority of notice given to Lloyd's. As an independent point, the appellants contended that, quite apart from any question of notice, the trustees' interest ought to be postponed to that of the
H appellants on account of the misleading form of the documents and the nature
I of the transaction.

I cannot give to the documents the construction contended for by the appellants. The investments remained subject to the trusts of the settlement, save in so far as those trusts might be varied or abrogated by an exercise of the joint power of appointment conferred by the settlement on the bankrupt and his father. The appointments of 1933 and 1934 exercised this power only to the extent necessary to enable the conditions incidental to the bankrupt's admission as an underwriting member of Lloyd's to be complied with. Thus

these appointments did not confer on the bankrupt any equitable interest in the investments. The application to the investments of the trusts of the settlement being preserved (subject only to their postponement in order to secure the due performance of the bankrupt's underwriting obligations), the bankrupt never had any equitable interest in the investments, and so never was capable of reassigning to the trustees of the settlement, as the first part of the argument suggests. He was, to my mind, never capable of assigning or charging the investments at all. With regard to the second presentation of this part of the argument, I take the view that there was no dealing by the bankrupt with the chose in action, because the benefit of the chose in action from the time of its creation belonged to the respondent trustees, and never at any moment belonged to the bankrupt in equity. In the words of the Court of Appeal, he was a mere conduit pipe in the conveyancing scheme.

In my view, in the above circumstances one does not come within the postulates of the rule in *Dearle v. Hall* (1). For the application of that doctrine there are at least four requirements, namely: a fundholder, someone who has, or has had, a beneficial interest, assignee No. 1 and assignee No. 2. I do not know of any case where the doctrine has been applied without there being someone who had at one time a beneficial interest. We were pressed with the argument that, in the classic *Dearle v. Hall* case (1), the assignor has no beneficial interest at the time he makes the second assignment and is, indeed, constructive trustee for the first assignee. I do not think that the rule would be restricted beyond its intendment or present effect if it were held to apply only where, at the time of the assignment, the assignor had a beneficial interest or had no beneficial interest only because he had voluntarily divested himself of it. Put negatively, the rule does not apply where the assignor had no beneficial interest and had not deprived himself of one by voluntarily divesting himself of it. In view of LORD MACNAGHTEN's words in *Ward v. Duncombe* (2) ([1893] A.C. 369 at pp. 384 et seq.), I am certainly not disposed to extend the doctrine. It was presented to us as a check—of necessity arbitrary—on the inevitable possible injustices of equitable assignments; all that one can do with an arbitrary rule is to endeavour to clarify its limits.

The limit which I have tried to indicate does not, in my view, conflict with any previous authority. The appellants relied on the Scottish case in this House of *Redfearn v. Somervail* (3) ((1813), 1 Dow. 50; 5 Pat. App. 707), in which one Steuart invested in his own name in the stock of the Edinburgh Glasshouse Company money belonging to a partnership of which he was a member. Steuart later borrowed money from Redfearn and assigned the Glasshouse stock to him as security. Redfearn intimated (i.e., gave notice of) this assignation to the company who had no intimation that the stock belonged to the partnership. On these facts the assignee won. Nevertheless, although LORD ELDON, L.C., is reported as saying (1 Dow. at p. 50):

“This is a most important case, especially as it concerns the interests of the commercial part of the community in both kingdoms”,

there are other aspects which must be borne in mind. The case was one under Scots law in which there is no separate system of equity and no precise differentiation between legal and equitable interests. It was not debated, even in your Lordships' House, whether the interest which Steuart assigned was a legal or an equitable interest, though LORD REDESDALE (*ibid.*, at p. 68) treated it as legal, as, apparently, did Sir Samuel Romilly who appeared for the appellant (*ibid.*, at p. 64). When the case came to be commented on by LORD WATSON in *Heritable Reversionary Co., Ltd. v. Millar* (4) ([1892] A.C. 598 at p. 610), he stated a principle about the acquisition of an equitable interest from a trustee which, under Scots law, is quite different from the equally authoritative statement of English law by LORD CAIRNS, L.C., in *Shropshire Union Railways & Canal Co. v. R.* (5) ((1875), L.R. 7 H.L. 496 at p. 505). Moreover, as far as I am

A aware, *Redfearn v. Somervail* (3) is not referred to in any English text-book. For all those reasons, this would be a most dangerous field to argue from Scots to English law, and *Redfearn v. Somervail* (3) is not, of course, authority for preferring the assignee who has given notice when the assignor did not possess either a legal or a beneficial interest.

B I now come to the independent point that the trustees' interest ought to be postponed irrespective of the rule in *Dearle v. Hall* (1). The trustees were, of course, parties to the deeds of appointment and release, but it must also be remembered that the manner of exercise of the power of appointment was a matter for the appointors. Furthermore, counsel for the appellants, to whose complete and interesting argument I should like to pay tribute, frankly put forward his case as not so strong as that which was successful in *Re King's*
C *Settlement, King v. King* (6) ([1931] All E.R. Rep. 692) or in *Abigail v. Lapin* (7) ([1934] All E.R. Rep. 720). I have tried to give full effect to his request that I should consider not only the form of the documents but the transaction as a whole, but I cannot find anything approximating to a misrepresentation which should result in the postponement of the interest of the trustees.

D On the view that I have taken, it is not necessary for me to consider whether the opinion of EVE, J., in *Hill v. Peters* (8) ([1918] 2 Ch. 273) that, for the purposes of the rule in *Dearle v. Hall* (1), there is a distinction between a declaration of trust and an equitable assignment, is correct. Nor am I required to pronounce on counsel for the respondents' submission that, even if the rule in *Dearle v. Hall* (1) applied, there was notice to Lloyd's which would have the effect of maintaining the priority of the respondent trustees.

E I would dismiss the appeal with costs.

LORD MORTON OF HENRYTON: My Lords, the facts of this case have been fully stated by the Lord Chancellor and I shall not repeat them. After much reflection on the able arguments presented by counsel on both sides, I find myself entirely in agreement with the Court of Appeal.

F The appellant plaintiffs sought to establish in the action that the first and second charges executed in their favour by A. G. H. Willis (hereafter referred to as "the bankrupt") had priority over the equitable interest of the two respondent trustees in certain investments standing in the name of the respondent Lloyd's. In my view, this claim must fail because the bankrupt was never able to create any charge on these investments. He was not the legal owner of them, and the deeds of appointment and release of Feb. 13, 1933, and June 11,
G 1934, did not confer on him any beneficial interest therein. And

"no ground has been established for holding that the charges should nevertheless be held effective by estoppel or on any analogous principle; nor was any such ground pleaded by way of answer to the respondent trustees' contention that the charges were invalid."

H I borrow this language from the judgment of the Court of Appeal.

Counsel for the appellants contended that their clients had obtained priority over the respondent trustees by giving to Lloyd's notice of their two charges, under the well-known rule in *Dearle v. Hall* (1) ((1828), 3 Russ. 1). My Lords, in my opinion, the rule in *Dearle v. Hall* (1) has no application to this case. That rule applies where there is a debtor or fundholder, and an individual who, having
I a beneficial interest in the debt or fund, executes two or more successive equitable assignments of, or charges on, that interest in favour of different persons. In these circumstances, questions of priority arise. But no question of priority can arise in the present case, where the bankrupt has merely executed two wholly ineffective charges, both in favour of the same party.

Counsel for the appellants sought to satisfy your Lordships that there were defects in the equitable title of the respondent trustees to the funds in question. He failed to satisfy me that these defects exist, but I need not pursue that matter, for the appellants cannot succeed unless they show that they acquired

a charge on the funds; and this they have failed to do. No one of the numerous cases cited, dealing with the law of England, has any application to the present case, if the views which I have just stated are correct. Counsel for the appellants, however, rely on a Scottish case, *Redfearn v. Somervail* (3) ((1813), 1 Dow. 50; 5 Pat. App. 707), which came to this House. In that case, which was prior in date to *Dearle v. Hall* (1), one David Steuart was registered in the books of an unincorporated society called the Edinburgh Glasshouse Company as the owner of a share therein. In fact he held the share as trustee for a firm whereof he was a partner. He borrowed £1,400 from one Redfearn, and assigned the share to him as security for the debt. Redfearn gave notice of the assignment to the company, and this House held that he had priority over the claims of the partnership firm. It would seem clear that the law applicable was Scots law, but it was suggested, in the course of the argument in the present case, that *Redfearn v. Somervail* (3) was one of the early cases in this House in which English law was applied in a Scottish case, and there are passages in the speeches of LORD REDESDALE and LORD ELDON, L.C., which indicate that this is so. However this may be, my Lords, I find *Redfearn v. Somervail* (3) of no assistance in the present case, for it would appear to be a case in which a trustee assigned, in breach of trust, a share whereof he was the registered owner. As LORD REDESDALE said (1 Dow. at p. 68), Steuart had a complete legal title. In the present case, the bankrupt was not the registered owner of the shares which he proposed to charge in favour of the appellants. He could not transfer them and, as I have said, the relevant deeds did not confer any beneficial interest in them which he could charge in favour of the appellants. As the Court of Appeal correctly observed, the interests now claimed by the appellants were never, in fact, capable of being created by the bankrupt, "even in breach of trust". That fact, in my opinion, completely distinguishes the present case from *Redfearn v. Somervail* (3).

For these reasons, the appellants' case fails in limine. Two questions much discussed at the hearing were (i) whether, for the purposes of the rule in *Dearle v. Hall* (1), there is any difference between an equitable assignment and a declaration of trust, and (ii) whether certain facts and events referred to in para. 3 of the defence of the respondent trustees constituted sufficient notice to Lloyd's to preserve the trustees' priority, even if the rule in *Dearle v. Hall* (1) applied in this case. On the view which I take, neither of these questions arises, and I express no opinion on them.

I should add that all the counsel appearing in this case invited your Lordships to disregard the fact that the bankrupt had a life interest in the funds subject to the trusts of the resettlement of Mar. 2, 1927, from and after the death of his father, on which he had created a charge. Accordingly, I have made no mention of that fact in expressing my opinion.

I would dismiss the appeal.

LORD REID: My Lords, Mr. A. G. H. Willis, whom I shall call "the bankrupt", became a member of Lloyd's in 1933. In order to do so, he had to procure the deposit with Lloyd's of certain funds. Those funds came from settled funds over which he and his father had a joint power of appointment, and the transaction took the form of three deeds—all executed on Feb. 13, 1933—an exercise by the bankrupt and his father of this joint power and two trust deeds to which the bankrupt and Lloyd's alone were parties. It was argued for the respondents that, although Lloyd's were not parties to the deed of appointment, in fact they had notice of it. But, in my opinion, no sufficient evidence was led to establish this, and this case must be taken on the footing that Lloyd's had no notice of the deed of appointment or of its terms at any relevant time.

The trust deeds to which Lloyd's were parties narrated that the bankrupt had transferred or caused or procured to be transferred to Lloyd's certain funds to be held on the trusts therein mentioned, and they provided that the income

A from those funds was to be paid to the bankrupt, his executors, administrators or assigns as he or they should direct, that the funds might be used to pay certain claims if they should arise, and that the funds, or so much as should not be applied for such purposes, should be held in trust for the bankrupt, his executors, administrators or assigns. There was nothing in these trust deeds to indicate that the bankrupt was not beneficially entitled to these funds.

B In 1951 the bankrupt borrowed money from the appellants, and, in order to stop proceedings against him in respect of this loan, in 1953 he charged, or purported to charge, in favour of the appellants the funds deposited with Lloyd's. Later he granted a further charge. The appellants asked and were informed by Lloyd's that Lloyd's had no notice of any other charge on these funds. Written notices of these charges were given to Lloyd's. The bankrupt was adjudicated

C bankrupt in 1954. In the present action, the appellants seek a declaration that these charges rank in priority to any interest of the respondent trustees in these funds. The respondents deny the validity of these charges and found on the deed of appointment. By that deed, the appointors appointed that the funds to be transferred to Lloyd's should thenceforth be held on trust that the trustees of the settlement should forthwith transfer these funds to Lloyd's to be held

D by them under the trust deeds to which I have referred, but subject to a proviso that, in so far as under these deeds the trust funds were directed to be held on trust for the bankrupt, his executors, administrators or assigns, they should be deemed to be subject to the trusts, powers and provisions to which they would have been subject if the deed of appointment had not been executed. I do not quote the terms of the deed at length because I am satisfied that the bankrupt

E was given no beneficial interest in the funds held by Lloyd's. He was entitled to receive those funds from Lloyd's, but he was bound to take them as trustee. I do not think that it matters whether he was bound to hand them over at once to the settlement trustees, or whether he could have kept them in his own hands. In no case could he, without breach of trust, use them for his own purposes, or attempt to create any charge on them in respect of his own debts.

F The appellants' case can, I think, be simply stated. They say that their charges were granted by a person who, on the face of the only document known to Lloyd's, was apparently beneficially entitled to the funds; that they, the appellants, had no means of discovering the respondents' rights, and that they took the charges bona fide and for value; that they gave notice of these charges to Lloyd's before Lloyd's had any notice of the respondents' rights; and that they, therefore, acquired priority over the rights of the respondents, although these rights

G were earlier in date than their own. For this they rely on the rule in *Dearle v. Hall* (1) ((1828), 3 Russ. 1). The respondents, on the other hand, deny that this rule is applicable to this case and they rely on the general rule that an equitable interest which is earlier in date has priority.

H In the typical *Dearle v. Hall* case (1), a person, who is beneficially entitled to an equitable interest in a fund held by another person X, first assigns his interest to A, and then assigns or purports to assign the same interest to B. Then B succeeds in giving notice to X of his assignment before A has given notice to X of his assignment. B is then held to have acquired priority over A in spite of the assignment to A being earlier in date. The present case differs from such a typical case in two respects. First, the assignor, the bankrupt, never had any beneficial

I right in the funds which he purported to assign to the appellants; the title of the respondents to those funds flowed not from him but from the deed of appointment. And, secondly, the right of the respondents which is the earlier in date arose not from an assignment but from the creation of a trust in their favour.

In considering what weight should be given to these distinctions, I must keep in mind that it has been recognised, at least since *Ward v. Duncombe* (2) ([1893] A.C. 369), that the rule in *Dearle v. Hall* (1) ought not to be extended to a new case (see *ibid.*, at p. 394 per LORD MACNAGHTEN). But that must, I think, mean a case where there is a significant distinction from the position in *Dearle v.*

Hall (1). And I have great difficulty in regarding it as a significant distinction A that the bankrupt in this case never had a beneficial right, whereas the assignor in the typical *Dearle v. Hall* case (1) had a beneficial interest until he assigned it to the first assignee. What ground is there for preferring the second assignee in a case where the assignor once had a beneficial right, but not where the assignor never had such a right? If, in the former case, the assignor retained even a shadowy right, some kind of residual right which he could still assign after the B first assignment, the distinction would be clear; or, putting it otherwise, the distinction would be clear if the first assignee only got an inchoate right by the assignment to him and had to complete or perfect his right by giving notice to the fundholder. But, as I read *Ward v. Duncombe* (2)—and I can find nothing to the contrary in any later authority cited to us—the right of the first assignee does not require to be completed or perfected by notice; the assignment to him C completely divests the assignor. In both the typical *Dearle v. Hall* case (1) and the present case, the assignor had nothing at all to give when he made the second assignment, and I have difficulty in finding any sufficient reason why the position of the second assignee should be improved by the historical accident that his assignor once had some right which he had no longer at the time when he made the second assignment.

I turn to consider whether the respondents are in a better position than the first assignees in the typical *Dearle v. Hall* case (1), neither having given notice of their rights to the fundholder before notice was given by the subsequent assignee. I agree with your Lordships that there was nothing in the form of the 1933 trans- D action or the conduct of the respondents which could disentitle them if, on other grounds, they are entitled to a preference. Therefore, I must consider whether E the rule in *Dearle v. Hall* (1) is inapplicable, because the respondents' rights flow not from an assignment to them but from a trust.

We were referred to the decision of this House in a Scottish case *Redfearn v. Somervail* (3) ((1813), 1 Dow. 50; 5 Pat. App. 707). In that case, money belong- F ing to a partnership was invested in £2,000 stock of the Edinburgh Glasshouse Company, which was not a corporation. The stock was held in the name of Steuart, one of the partners. Steuart borrowed money from Redfearn and assigned the Glasshouse Company stock to him in security. This assignation was immediately intimated to the company, who had no notice that the stock, in fact, belonged to the partnership. Steuart became bankrupt and Somervail, one of his partners, claimed to have a better right to the stock than Redfearn. These facts have a resemblance to the facts of the present case. The arguments in G the Court of Session are well set out in Morison App. Personal and Real No. 3, from which I quote some passages. For Redfearn it was argued:

“The onerous and bona fide acquirer of such a personal right, by a regular transference from the person who ex facie is proprietor, regularly completed by intimation to the debtor, is secure against every latent claim of these parties . . . Intimation is, in such a case, equivalent to possession H of a movable subject, and must therefore cut off every claim at the instance of mere personal creditors, which every person competing with the assignee, whose assignation is intimated, is held to be, whether he founds his claim upon a prior assignation and declaration of trust, or on any other ground whatever.”

For Somervail it was answered: I

“When any person holds a subject in his possession, which is not his property, no act of his can transfer the property to another, to the prejudice of the real owner . . . The right to this stock never belonged to Mr. Steuart, but was a mere trust in him from the beginning, for his creditors; and as a trust does not require *intimation* to give it full effect, the right of the trustees was all along complete.”

The court, reversing the decision of the Lord Ordinary (LORD CRAIG), found that

A the stock having stood in the person of Steuart in trust for the partnership, this excluded the assignment by Steuart to Redfearn. That decision was reversed by this House. I think that the grounds of judgment sufficiently appear from two short passages in the speech of LORD ELDON, L.C. (1 Dow. at p. 70):

B “If then the Glass Company was the debtor, the question here was not between the assignee and the debtor, but between the assignee and a person setting up a collateral claim in the nature of that of a cestui que trust. [ibid., p. 72] If latent equities were suffered to prevail against assignments, the effect would be that nothing could ever be assigned; for as long as their Scotch neighbours retained any part of their characteristic shrewdness, they would never take an assignment if they were aware that by means of latent equities such assignments might give them nothing . . . He had found how-

C ever no case nor authority of any kind to support this position—that an intimated assignation might be defeated by a latent equity, which as being latent ex necessitate could not be intimated.”

It will be seen that there was no discussion whether the right held by Steuart and assigned to Redfearn was a legal or an equitable right or interest. In Scotland there never was a separate court or a separate system of equity, and, therefore,

D there never has been a sharp distinction between legal and equitable rights or interests. For this reason, great caution must, in my view, be exercised in this field in using Scottish authorities in English cases or vice versa.

There may also be a somewhat different approach in the two countries to the matter of trusts. *Redfearn's* case (3) was explained by LORD WATSON in *Heritable Reversionary Co., Ltd. v. Millar* (4) ([1892] A.C. 598) in this way (ibid., at p. 610):

E “It must, however, be kept in view that the validity of a right acquired in such circumstances by a bona fide disponee for value does not rest upon the recognition of any power in the trustee which he can lawfully exercise, because breach of trust duty and wilful fraud can never be in themselves lawful, but upon the well-known principle that a true owner who chooses to conceal his right from the public, and to clothe his trustee with all the

F indicia of ownership, is thereby barred from challenging rights acquired by innocent third parties for onerous considerations under contracts with his fraudulent trustee.”

With that I may contrast what was said by LORD CAIRNS, L.C., in *Shropshire Union Railways & Canal Co. v. R.* (5) ((1875), L.R. 7 H.L. 496 at p. 505):

G “. . . any person with whom Holyoake might deal by virtue of his title upon the register, had, or ought to have had, these considerations present to his mind. He ought to have known that although Holyoake's name appeared upon the register as the owner of these shares, and although Holyoake could present to him the certificates of this ownership, still it was perfectly possible either that these shares were the beneficial property of Holyoake himself, or that they were the property of some other person.

H If he dealt merely by equitable transfer, or equitable assignment with Holyoake, and if it turned out that the beneficial ownership of Holyoake was coincident and co-extensive with his legal title, well and good; his right would be accordingly, so far as Holyoake was concerned, complete. But if, on the other hand, it should turn out that Holyoake's beneficial interest was either nil, or was not co-extensive with the whole of his apparent legal title, then I say any person dealing with Holyoake, by way of equitable bargain or contract, should have known that he could only obtain

I a title which was imperfect, and would not bind the real beneficial owner.”

If that is an accurate statement of the law—and no one suggests otherwise—it would appear to show that to apply the rule in *Dearle v. Hall* (1) to defeat the rights of a cestui que trust would introduce an exception to the general law. It might, therefore, be sufficient to say that the rights of a cestui que trust are clearly different from the rights of an assignee, that there is no authority for

applying the rule in such a case, and that so to apply the rule would be extending it to a new case—a thing which all recent authorities recognise should not be done. But LORD MACNAGHTEN said in *Ward v. Duncombe* (2) ([1893] A.C. at p. 394):

“... it seems to me that when your Lordships are asked to extend the rule to a case not already covered by authority, it is proper to inquire into the principles upon which the rule is said to be founded.”

For that I cannot do better than quote what BUCKLEY, J., said in *Re Dallas* (9) ([1904] 2 Ch. 385 at p. 396):

“When the judgments in that case [*Ward v. Duncombe* (2)] are read, I think it will be found that what was there established was, first, that the doctrine of notice rests upon the principle that the equitable assignee ought to take such steps as will prevent the assignor from retaining the apparent ownership of the fund; and, secondly (if it be a different proposition, although I think it is only an application of the former one), that he must take such steps as will give him a right in rem against the fund as distinguished from a right against the conscience of the assignor of the fund, and that that ought to be done by his taking possession of the fund to some extent—not necessarily to the full extent, but so far as possible.”

I also agree with what was said by EVE, J., in *Hill v. Peters* (8) ([1918] 2 Ch. 273 at p. 279):

“The principle on which the rule in *Dearle v. Hall* (1) is founded, which regards the giving of notice by the assignee as the nearest approach to the taking of possession, has no application, in my opinion, to the beneficiary who has no right to possession himself, and who can only assert his claim to receive through his trustee.”

I think that it would be an innovation in the law of England to require a cestui que trust for his own protection to give notice of the trust in his favour to the person who holds the fund, and I therefore agree that this appeal should be dismissed.

LORD COHEN: My Lords, I have had an opportunity of reading the speeches which have been delivered by the Lord Chancellor and by the noble and learned lord, LORD MORTON OF HENRYTON, and find myself in such complete agreement with them and with the Court of Appeal that I can state quite shortly my reasons for concurrence. I need not restate the facts. Suffice it to say that I agree with the noble and learned lord, LORD REID, that, on the true construction of the deed of appointment, the bankrupt never had any beneficial interest in the funds which he purported to assign to the appellants. In making this observation I have not ignored his interest under the original deed of resettlement of Mar. 2, 1927, an interest preserved by the provisos in cl. 1 (ii) and cl. 2 (ii) of the deed of appointment, but the existence of that interest is irrelevant to the question your Lordships have to decide.

The fact that the bankrupt has no beneficial interest in the fund is, in my opinion, fatal to the appellants' claim under the rule in *Dearle v. Hall* (1) ((1828), 3 Russ. 1). The headnote in that case is in these terms:

“A person having a beneficial interest in a sum of money, invested in the names of trustees, assigns it for valuable consideration to A., but no notice of the assignment is given to the trustees; afterwards, the same person proposes to sell his interest to B., and B., having made inquiry of the trustees as to the nature of the vendor's title, and the amount of his interest, and receiving no intimation of the existence of any prior incumbrance, completes the purchase, and gives the trustees notice: B. has a better equity than A. to the possession of the fund, and the assignment to B., though posterior in date, is to be preferred to the assignment to A.”

Now I know of no case where the rule in *Dearle v. Hall* (1) has been applied where the creator of the incumbrances never had any beneficial interest in the fund. Nor were counsel able to direct our attention to any such case. Counsel

A for the appellants submitted that this lack of beneficial interest does not prevent the application of the rule in *Dearle v. Hall* (1) since, where that rule applies, the creator of the incumbrances has always given the second incumbrancer a charge on something which he has not himself got at the time of creating the charge. It seems to me, however, that it is of the essence of the rule in *Dearle v. Hall* (1) that the creator of the incumbrances, when he created the first equitable incumbrance, had a beneficial interest in the fund, and the reason for the postponement of the first incumbrancer seems to be that, by failing to give notice to the fundholder, the first incumbrancer failed to take a step which he could have taken to protect his interest in the fund and which, if taken, would have resulted in the intending second incumbrancer having notice of the first incumbrance. It would, I think, be an extension of this principle if we were now to hold that the creator of the incumbrances could give to a second incumbrancer a larger equitable right than he himself ever had. If the extension were plainly justified by the principles underlying that case, I must make the extension, but, if I may respectfully adopt the language of LORD MACNAGHTEN in *Ward v. Duncombe* (2) ([1893] A.C. 369 at p. 394), I do not think that those principles are so clear or so convincing as to compel me to hold that a man may create in favour of an incumbrancer a charge on a right he never had.

For the reasons given by LORD MORTON OF HENRYTON, I do not find anything in the decision in *Redfearn v. Somervail* (3) ((1813), 1 Dow. 50; 5 Pat. App. 707) inconsistent with the view I have formed in this case.

This conclusion makes it unnecessary for me to consider at any length the other matters which were discussed at the hearing of the appeal, but, since E WYNN-PARRY, J., in the Chancery Division, and my noble and learned friend, LORD REID, both relied on some observations of EVE, J., in *Hill v. Peters* (8) ([1918] 2 Ch. 273), I will add some observations on that case. EVE, J., said (*ibid.*, at p. 279):

“The principle on which the rule in *Dearle v. Hall* (1) is founded, which regards the giving of notice by the assignee as the nearest approach to the taking of possession, has no application, in my opinion, to the beneficiary who has no right to possession himself, and who can only assert his claim to receive through his trustee.”

It may well be that this is a correct statement of the law but, as counsel for the appellants pointed out in the course of the argument, it was not really necessary to the decision in *Hill v. Peters* (8). In that case, the fund was a mortgage debt of £4,000 secured on a reversionary interest in a share of personalty settled by a will. The fundholders were the trustees of that will; notice of the mortgage was given to them by the solicitors in whose names the mortgage was taken. The solicitors declared themselves trustees of the mortgage in favour of two of their clients, and afterwards purported to assign the reversionary interest to the other mortgagees represented by the plaintiffs who gave notice of this mortgage to the trustees of the will and claimed priority over the cestuis que trust on the basis of such notice. Counsel submitted, I think correctly, that the case could have been decided on the simple ground that the notice given to the executors of the will by the solicitors would enure to the benefit of their cestuis que trust and, being prior in date to the notice given by the plaintiffs, there was no room for the application of the rule in *Dearle v. Hall* (1). For this reason, while not dissenting from the observations of EVE, J., I prefer to base my opinion that the appeal should be dismissed solely on the ground I have already stated.

LORD KEITH OF AVONHOLM: My Lords, this case has raised in my mind doubts which are not entirely removed by the opinions of your Lordships more versed than I in the principles of English equity law. I should at the outset explain my view of the construction and effect of the deeds of appointment. In the exercise of a power of appointment under the settlement of 1927, Mr. Willis and his father appointed certain securities to be held on trust that the trustees

of the settlement should forthwith transfer them into the name of Lloyd's to be held by Lloyd's subject to certain trusts under the marine and non-marine trust deeds and subject to these trusts "in trust for Mr. Willis his executors administrators or assigns". If and when Mr. Willis received the securities from Lloyd's, they were to be "deemed" to be subject to the trusts of the settlement. This last was a trust, created by Mr. Willis and his father, which was latent so far as Lloyd's was concerned, for I cannot hold that they had any notice of this trust, and it was also one which the appellants had no means of discovering. The position then was this. Mr. Willis had no right or title to the securities, except to demand delivery of them by Lloyd's when the purposes of the marine and non-marine trust deeds had been satisfied. He could not be a trustee of the securities till he had reduced them into his possession. Before this happened, he had charged the securities deposited with Lloyd's, in security of loans made to him by the appellants, and these charges were duly intimated to Lloyd's.

I accept it that Mr. Willis had neither the legal title nor the equitable right in the securities. He had no more than the title to demand the securities from Lloyd's, in certain eventualities. This title he assigned to the appellants. I share the difficulty expressed by my noble and learned friend, LORD REID, in seeing that, in this situation, the fact that Mr. Willis never had a beneficial interest in the securities creates a significant distinction from the position in a typical *Dearle v. Hall* case (1) ((1828), 3 Russ. 1). I understand that the others of your Lordships take the view that *Dearle v. Hall* (1) has never been applied to a case where the assignor never had a beneficial interest in the thing assigned, and that the rule of *Dearle v. Hall* (1) should not be extended to cover such a case. Though I might pause long before conceding the logic or reasonableness of such a limitation, I am not prepared on the authorities which have been cited to differ on a point which is so peculiarly a matter of English equity law.

I would wish only to add two observations. First, that, in other circumstances, in which the question may arise whether a latent trust or right in equity can defeat an intimated assignment, *Redfearn v. Somervail* (3) ((1813), 1 Dow. 50; 5 Pat. App. 707), will, in my opinion, require more consideration. Though a Scots decision, I have little doubt that LORD ELDON, L.C., and LORD REDESDALE were applying English law and would have reached the same decision in like circumstances in an English case. As Lord Justice-Clerk MONCREIFF said in *North British Ry. Co. v. Lindsay* (10) ((1875), 3 R. (Ct. of Sess.), 168 at p. 176):

"Until the case of *Redfearn*, decided in the House of Lords in 1813, the rule assignatus utitur jure cedentis was very largely applied. In that case, in which it was for the first time found that a special assignee was not bound by a latent trust which qualified the right of his cedent, it was conceded that the previous rule of the law of Scotland was otherwise, and the judgment proceeded on views of expediency which prevailed in the law of England."

The case also supports the view noted by LORD MACNAGHTEN in *Ward v. Duncombe* (2) ([1893] A.C. 369 at p. 384) that the rule of *Dearle v. Hall* (1) had in LORD ELDON an origin earlier than is generally supposed. Secondly, I would hesitate to agree with my noble and learned friend, LORD REID, that the decision of this House in *Shropshire Union Railways & Canal Co. v. R.* (5) ((1875), L.R. 7 H.L. 496) was conclusive in all cases of latent trusts. The circumstances of that case were somewhat special, and some of the observations in that case are not easy to reconcile with the remarks of LORD WATSON in the later case of *Heritable Reversionary Co., Ltd. v. Millar* (4) ([1892] A.C. 598 at p. 610).

I agree, though with some hesitation, that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *M. A. Jacobs & Sons* (for the appellants); *Rashleigh & Co.* (for the first and second respondents, the trustees of the settlement of 1927).

[Reported by G. A. KIDNER, ESQ., Barrister-at-Law.]

A

Re SIMPKIN MARSHALL, LTD.

[CHANCERY DIVISION (Wynn-Parry, J.), July 31, October 30, 1958.]

Solicitor—Costs—“Contentious business” or non-contentious business—Solicitor instructed by liquidator of company to obtain counsel’s opinion whether certain proceedings should be taken—No proceedings taken—Lump sum bill delivered—Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 Geo. 5 c. 49), s. 225—Solicitors Act, 1957 (5 & 6 Eliz. 2 c. 27), s. 86 (1)—Solicitors’ Remuneration Order, 1883, art. 2 and Sch. 2, as amended and substituted by the Solicitors’ Remuneration Order, 1953 (S.I. 1953 No. 117).

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In October, 1956, the liquidator of a company, which was being wound-up under an order of the court, instructed solicitors to obtain counsel’s opinion (a) whether any officer of the company had committed a breach of trust on which misfeasance could be founded, and (b) as to the recoverability of the balance of certain deposits paid by the company to a third party. No proceedings were taken in either case. On Nov. 21, 1957, the solicitors delivered a lump sum bill, which was taxed, as non-contentious business, under Sch. 2 to the Solicitors’ Remuneration Order, 1883 (as amended), in accordance with art. 2 (c) of the Order. The liquidator lodged objections to the basis of the taxation on the ground that the costs were in respect of business in an “action”, i.e., the winding-up proceedings, and, therefore, were excluded from art. 2 of the Order of 1883 by the words “not being business in any action” therein, and should be taxed under R.S.C., Appendix N, in accordance with R.S.C., Ord. 65, r. 8. The objections were disallowed. By s. 86 (1) of the Solicitors Act, 1957, “contentious business” was defined as “business done . . . in or for the purposes of proceedings begun before a court . . .” and “non-contentious” was defined as “any business done as a solicitor which is not contentious business as defined by this sub-section”. On a summons by the liquidator for the taxation to be reviewed, the further question arose whether the costs were in respect of contentious business within the definition in s. 86 (1) and thus were excluded from the scope of the Order of 1883 and were taxable under Appendix N to the R.S.C.

Held: (i) the business was not contentious business within s. 86 (1) of the Solicitors Act, 1957, and accordingly was rightly taxed as non-contentious business under art. 2 (c) of and Sch. 2 to the Solicitors’ Remuneration Order, 1883, for the following reasons—

(a) the scope of the Order of 1883 was now restricted by excluding such conveyancing and other business as was within the definition of contentious business in s. 86 (1), which definition extended to, e.g., conveyancing business in an action (see p. 615, letters E and F, post).

(b) advising a liquidator in a compulsory winding-up whether an action should be begun by writ was not contentious business unless the action were begun, because the proceedings to which the advice was referable were the action, not the winding-up (see p. 616, letter I, post), and

(c) so, also, advising a liquidator in a compulsory winding-up whether a misfeasance summons should be issued was not contentious business unless the summons were issued, notwithstanding that the summons would be entitled in the winding-up and would thus be a proceeding in the winding-up (which itself was a proceeding before the court) within the definition of contentious business in s. 86 (1) (see p. 617, letter D, post).

Stanford v. Roberts ((1884), 26 Ch.D. 155) considered.

(ii) a petition for compulsory winding-up was not an “action” within s. 225 of the Supreme Court of Judicature (Consolidation) Act, 1925, since the form of proceedings for compulsory winding-up was provided by the Companies Act, 1948, s. 224, not by rules of court (see p. 613, letter G, post).

Per CURLIAM: all business is now to be regarded as contentious which is done before proceedings are begun, provided that the business is done with

a view to the proceedings being begun and that they are in fact begun, and also all business done in the course of the proceedings; all other business is non-contentious (see p. 615, letter G, post). A

[**Editorial Note.** Power is conferred by s. 56 (2) of the Solicitors Act, 1957, to make orders regulating solicitors' remuneration in non-contentious business, which term is defined in s. 86 (1) as business which is not contentious business as there defined. The Solicitors' Remuneration Order, 1883, as amended, is continued in force by s. 88 (2) for the purposes of s. 56 (2). The definition of contentious business, now contained in the Act of 1957, was altered to its present form by the Solicitors (Amendment) Act, 1956, s. 13 (4) (a). The decision in the present case proceeds on the basis that this alteration affects the scope of the Order of 1883 as continued in force, and indeed restricts it by excluding conveyancing business done in an action, since such business is now within the definition of contentious business. In this respect, viz., the alteration of the scope of the existing Order of 1883, the decision may be compared with *Re A Solicitor* ([1955] 1 All E.R. 257), which was, however, prior to the amendment of the definition of contentious business by the Act of 1956. B

For the Supreme Court of Judicature (Consolidation) Act, 1925, s. 225, see 18 HALSBURY'S STATUTES (2nd Edn.) 517. C

For the Solicitors Act, 1957, s. 86 (1), see 37 HALSBURY'S STATUTES (2nd Edn.) 1125; and for the Solicitors (Amendment) Act, 1956, s. 13 (4) (a), see 36 HALSBURY'S STATUTES (2nd Edn.) 772. D

For the Solicitors' Remuneration Order, 1883, art. 2 (as amended), and Sch. 2 (as substituted by the Solicitors' Remuneration Order, 1953), see 20 HALSBURY'S STATUTORY INSTRUMENTS 196, 202. E

For R.S.C., Ord. 65, r. 8, see the ANNUAL PRACTICE, 1959, p. 1893.]

Cases referred to:

- (1) *Stanford v. Roberts*, (1884), 26 Ch.D. 155; 53 L.J.Ch. 338; 50 L.T. 147; 48 J.P. 692; 42 Digest 232, 2648.
- (2) *Re Merchant Taylors' Co.*, (1885), 30 Ch.D. 28; 54 L.J.Ch. 867; 52 L.T. 775; 42 Digest 241, 2732. F

Summons for review of taxation.

On May 2, 1955, an order was made for the company to be wound up. In October, 1956, the official receiver, as liquidator of the company, instructed the respondents (a firm of solicitors) to obtain counsel's opinion on two matters: (a) whether any officer of the company had committed a breach of trust in relation to the company's affairs on which misfeasance could be founded; and (b) in regard to the recoverability of the balance of certain deposits paid by the company to a third party. This work involved, among other things, the perusal of a number of documents, the preparation of two cases to counsel, and advising the liquidator on counsel's opinions. No proceedings were taken in either of the matters. On Nov. 21, 1957, the respondents delivered a lump sum bill, which was taxed under Sch. 2 to the Solicitors' Remuneration Order, 1883 (as substituted by the Solicitors' Remuneration Order, 1953). The official receiver lodged objections, dated Mar. 6, 1958, to the allowance of £52 10s. as profit charges. The reasons for objections were summarised thus: (i) the remuneration prescribed in Sch. 2 to the Order of 1883 was not appropriate because art. 2 of the Order excluded "business in any action"; (ii) the winding-up proceedings were an "action" (which expression included a cause or matter) within the meaning of s. 225 of the Supreme Court of Judicature (Consolidation) Act, 1925, and any costs incurred in or for the purpose of conducting the winding-up were for business in an action; and (iii) the costs should properly be taxed under R.S.C., Appendix N, as costs in a cause or matter (as defined in s. 225 of the Act of 1925), in accordance with R.S.C., Ord. 65, r. 8. By his answers to objections, dated June 30, 1958, the taxing master (Master CULLIS) disallowed the objections. G

The official receiver now applied for the taxation to be revised by allowing H

A his objections and that the matter be referred back to the taxing master to tax the bill in accordance with Appendix N.

Denys B. Buckley for the applicant, the official receiver (the liquidator).

Milner Holland, Q.C., and *L. H. L. Cohen* for the respondents (the solicitors).

Cur. adv. vult.

B Oct. 30. **WYNN-PARRY, J.**, read the following judgment: This is a summons by the official receiver as liquidator of the company, which is in course of compulsory liquidation, for the review of a taxation of costs for work done by the respondents as solicitors for the company acting on the instructions of the applicant in the course of the winding-up. The work done consisted in taking all the necessary steps to obtain the advice of counsel (a) whether or not any officer of the company had committed a breach of trust in relation to the company's affairs on which proceedings for misfeasance could be founded, and (b) as to the recoverability of the unexpended balance of deposits paid by the company to a third party. In the event no proceedings were taken under either of the above heads. In those circumstances the respondents, treating the business as non-contentious business, delivered a lump sum bill. The taxing master accepted the view that the business was non-contentious, and taxed the bill under Sch. 2 of the Solicitors' Remuneration Order, 1883* (as amended), in accordance with art. 2 (c) of the Order. Article 2† provides that solicitors' remuneration is to be regulated by Sch. 2 where the work done relates to certain specified conveyancing matters "and in respect of other business, not being business in any action . . ." The applicant brought in objections to the basis of the taxation, contending that the business was contentious business, and that, therefore, under R.S.C., Ord. 65, r. 8, the costs were chargeable under Appendix N. The taxing master overruled the objections, and it is in these circumstances that the matter comes before me.

D The first ground put forward on behalf of the applicant can, I think, be quickly disposed of. He contends that the winding-up proceedings are an action within the meaning of that word in s. 225 of the Supreme Court of Judicature (Consolidation) Act, 1925, which provides:

" ' Action ' means a civil proceeding commenced by writ or in such other manner as may be prescribed by rules of court, but does not include a criminal proceeding by the Crown."

A petition for the compulsory winding-up of a company does not fall within this definition because, in the first place, a petition is not a writ of summons, and, in the second place, the form of proceeding is prescribed in the relevant statute, the Companies Act, 1948, s. 224, and not in either the Rules of the Supreme Court or the Companies (Winding-up) Rules, 1949.

G The main point, however, which was argued, was whether or not the business in question was contentious business. For the solution of this question one must first turn to s. 86 (1) of the Solicitors Act, 1957 (replacing s. 13 (4) (a) of the Solicitors (Amendment) Act, 1956‡), where it is provided:

H " ' contentious business ' means business done, whether as solicitor or advocate, in or for the purposes of proceedings begun before a court or before an arbitrator appointed under the Arbitration Act, 1950, not being business which falls within the definition of non-contentious or common form probate business contained in s. 175 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925 . . . ' non-contentious business ' means

* This order, originally known as the Solicitors' Remuneration Act General Order, 1882, was given the title " the Solicitors' Remuneration Order, 1883 ", by the Solicitors' Remuneration Order, 1944 (S.R. & O. 1944 No. 203), art. 1 (2).

† Article 2 of the Order of 1883 was amended by the Solicitors' Remuneration Order, 1953 (S.I. 1953 No. 117), art. 2, and the present Sch. 2 was substituted by the Order of 1953.

‡ The whole of the Act of 1956, except s. 2 (4) and Sch. 1, para. 5, was repealed by s. 88 (1) of and Sch. 3 to the Act of 1957, which came into force on July 15, 1957.

any business done as a solicitor which is not contentious business as defined by this sub-section." A

On this definition of contentious business it was contended on behalf of the applicant that, irrespective of the question whether or not the proceedings begun by petition for the compulsory winding-up of the company were within the definition of "action" in s. 225 of the Supreme Court of Judicature (Consolidation) Act, 1925, they were proceedings begun before a court. I accept this submission. Then comes the critical question: Was the business done "in or for the purpose of [those] proceedings"? The main contention of the applicant is built up in this way. First, it is said that the effect of the court making a winding-up order is to continue the proceedings begun by the petition until the final dissolution of the company. I accept this step. From this it is argued that all business done by a solicitor in the course of the winding-up is done in or for the purposes of those proceedings: ergo, such business is contentious business as defined in s. 86 (1) of the Solicitors Act, 1957. B C

In the ordinary course, business consisting of advising whether or not proceedings should be started is non-contentious business, and only becomes contentious business if proceedings are, in fact, started: hence the necessity in defining contentious business to include not only the preposition "in" but also the words "for the purposes of". It will thus be seen that, in the ordinary case, the test whether the business of advising on the question of bringing proceedings is to be regarded as contentious business depends on the course taken subsequently to the advice being given. It must follow from the argument of the applicant that, supposing the business done is advising whether or not a writ of summons should be issued, the nature of that business is not to be tested by posing the question: Were the proceedings in fact begun as a result of the advice? The question is answered as soon, indeed, as the business of advising is undertaken, because it is done "in" existing proceedings. The matter does not rest there. Carried to its logical conclusion the argument of the applicant must cover every type of business done by a solicitor in a compulsory liquidation, including such essentially non-contentious work as conveyancing. In his objections the applicant said this: D E F

"It is understood that the practice has always been to tax the costs of solicitors employed by a liquidator in a compulsory winding-up in accordance with R.S.C., Ord. 65, r. 8, which provides that in 'causes and matters . . . solicitors [should] be entitled to charge and be allowed the fees set forth . . . in Appendix N.' Only the costs of conveyancing business have been taxed under the [Order of 1883] (in accordance with R.S.C., Ord. 65, r. 27 (30)). This practice is supported by the decision in *Stanford v. Roberts* (1) ((1884), 26 Ch.D. 155)."

Prima facie it might be argued that R.S.C., Ord. 65, was intended to deal only with contentious business, and that R.S.C., Ord. 65, r. 27 (30), was in the nature of a mopping-up provision and did not include work and labour of a non-contentious nature. But, as appears from the passage from the objections which I have quoted, reliance is placed on the decision of KAY, J., in *Stanford v. Roberts* (1). In that case KAY, J., had to consider the effect of s. 2 of the Solicitors' Remuneration Act, 1881*, and the Solicitors' Remuneration Act General Order, 1882, made thereunder. Section 2 gave authority to the Lord Chancellor and the other persons named to make a general order H I

"... for prescribing and regulating the remuneration of solicitors in respect of business connected with sales, purchases, leases, mortgages, settlements, and other matters of conveyancing, and in respect of other business not being business in any action ..."

* The Act of 1881 was repealed by the Solicitors Act, 1932, which, in turn, was repealed by the Solicitors Act, 1957, s. 88 (1) and Sch. 3.

- A The General Order made in August, 1882, contained in art. 2 the above language from s. 2: that Order is now known as the Solicitors' Remuneration Order, 1883. KAY, J., decided that the words "not being business in any action" qualified only the immediate antecedent "in respect of other business", and, therefore, s. 2 and the General Order of 1882 covered conveyancing matters in an action as well as conveyancing matters out of court. His decision was approved
- B by the Court of Appeal in *Re Merchant Taylors' Co.* (2) ((1885), 30 Ch.D. 28). It is to be observed that KAY, J., was not concerned to decide whether conveyancing matters in an action were to be regarded as contentious matters or non-contentious matters. All that he had to decide was the short question of construction under s. 2 of the Solicitors' Remuneration Act, 1881, whether the conveyancing matters mentioned in that section included conveyancing matters in an action.
- C

Section 81 (1) of the Solicitors Act, 1932, defined contentious business as including

"any business done by a solicitor in any court, whether as a solicitor or as an advocate."

- D This is a narrow definition and would appear to recognise that conveyancing business done in or for the purposes of an action was not to be regarded as contentious business. It would thus support the practice to which I have referred. In 1956, however, the Solicitors (Amendment) Act, 1956, was passed, the relevant provisions of which came into force on Nov. 1, 1956, and applied to all bills delivered on or after that date. That Act contained in s. 13 (4) (a) a definition of contentious business similar to that which is now in s. 86 (1) of the Solicitors Act, 1957. This definition is very much wider in scope than the definition in the Act of 1932, and in my view, assuming that prior to Nov. 1, 1956, conveyancing business done in an action was non-contentious business, the position was changed on that date by the coming into force of the Solicitors (Amendment) Act, 1956. It appears to me that the definition of contentious business in that Act and the Solicitors Act, 1957, must include conveyancing business done in an action. The scope of
- E the Solicitors' Remuneration Order, 1883, must, therefore, be treated for the future as not extending to conveyancing business done in an action, the phrase
- F "in or for the purposes of proceedings begun before a court"* clearly including conveyancing business done in an action. This result, assuming it to be correct, as I hold that it is, may be said to have been achieved in an odd way, but there is this advantage, that there is now a clear and, I should have thought, logical division between contentious and non-contentious business. All business is now
- G to be regarded as contentious which is done before proceedings are begun, provided that the business is done with a view to the proceedings being begun, and that they are in fact begun, and also all business done in the course of the proceedings. All other business is non-contentious.

- H The relevance of the foregoing analysis is that it shows that for the applicant to succeed he must show that every piece of business, of whatever nature, which is done by a solicitor in the compulsory liquidation of a company on the instructions of the liquidator is contentious business. The result of accepting the validity of this proposition would be to point a very sharp distinction between business done by a solicitor in a compulsory winding-up and business done by a solicitor in a voluntary winding-up. In the case of a voluntary winding-up there is no
- I ground for saying that business consisting of advising the liquidator whether or not proceedings should be begun is anything but non-contentious business, unless the proceedings are in fact begun. But if the applicant's contention is correct, then the mere existence of the proceedings leading up to the order for compulsory winding-up makes all business done by a solicitor during the course of the winding-up contentious business.

I have found the question which is raised by this summons to be a really difficult

* In s. 13 (4) (a) of the Solicitors (Amendment) Act, 1956, and s. 86 (1) of the Solicitors Act, 1957.

one. Two minds could, with much show of reasoning, take opposite views. A
Further, as I shall show later, the whole question can easily be resolved for the
future by administrative action. However, it is my duty to pronounce on the
question before me and I shall proceed to do so.

As I have said earlier in this judgment, the result of presenting a petition for
the compulsory winding-up of a company is that proceedings have been begun
before a court. The relief asked by the petition is that the company should be B
wound up by the court. On the making of the order the proceedings thus begun
are not exhausted: they continue until the company is finally dissolved. This is
necessary in order to continue the jurisdiction conferred on the court by the making
of the order for winding-up. Throughout the period of winding-up the affairs of the
company, the jurisdiction of the court to control the winding-up continues, and
it continues by virtue of the legal proceedings begun by the presentation of the C
petition and the order to wind-up. As a result of the making of the order, there
are brought into operation all the provisions of the Companies Act, 1948, relating
to a compulsory winding-up. Section 237 of that Act provides:

“For the purpose of conducting the proceedings in winding-up a company
and performing such duties in reference thereto as the court may impose,
the court may appoint a liquidator or liquidators.” D

In that section the word “proceedings” has a wider import than the phrase
“legal proceedings”. It includes all the steps which must be taken by the
liquidator in order to achieve the object of the order of the court, videlicet the
winding-up of the affairs of the company, leading to its eventual dissolution.
By s. 245 (1) of the Act it is provided:

“The liquidator in a winding-up by the court shall have power, with the
sanction either of the court or of the committee of inspection,—(a) to bring
or defend any action or other legal proceeding in the name and on behalf
of the company . . . (c) to appoint a solicitor to assist him in the performance
of his duties . . .” E

Let me consider first a case in which, with the sanction of the committee of F
inspection, the liquidator takes legal proceedings, which are begun by writ of
summons. Put aside for the moment any advice which may have been given by
the solicitor to the liquidator prior to the issue of the writ. Then let the question
be asked: Is the business which the solicitor conducts in the action in or for the
purposes of that action or is it in or for the purposes of the legal proceedings
begun by the petition for the winding-up of the company? To my mind, the G
answer must be that the business is done in or for the purposes of the action.
Then the question must be asked: Assuming that the liquidator obtained advice
prior to the issue of the writ, was that advice obtained in or for the purposes of
the legal proceedings begun by the petition or for the purposes of the action
postulated? To my mind, the answer is that he obtained the advice for the
purposes of the action. The advice is not referable to the relief claimed in the H
petition. It was obtained for the purposes of the “proceedings” in the winding-up,
using the word in the sense in which it is used in s. 237 of the Companies Act,
1948. The advice was obtained for the purpose of deciding whether or not to
begin substantive legal proceedings and is, therefore, referable to those legal
proceedings. If, therefore, legal proceedings are begun, the business involved in
giving or procuring the advice must be treated as contentious business: but if I
legal proceedings are not begun, then the advice must be treated as having been
obtained in the course of the proceedings (using the word in its wide sense) in
winding-up, and must, therefore, be treated as non-contentious business.

The question then arises: Is there any difference between legal proceedings
begun by writ in the course of a compulsory winding-up and such proceedings
begun by summons entitled with the same heading as that in the petition for an
order for the compulsory winding-up? Proceedings of this nature fulfil the con-
ditions of s. 245 (1) (a) of the Companies Act, 1948, because they are taken in the

A name and on behalf of the company. They are begun when, and only when, the necessary summons is issued. They are brought in order to obtain the substantive relief claimed, and that relief is claimed for the purposes of the winding-up and not for the purposes of the proceedings in which the winding-up order was obtained.

B The words of the definition of "contentious business"*, however, are "in or for the purposes of proceedings begun before a court". The disjunctive conjunction "or" is used and, therefore, the question must be answered: What is the effect of taking out a summons in the winding-up which, by the rules of procedure, is entitled "In the" legal proceedings which led to the making of the order for winding-up, which proceedings continue in being until the final dissolution of the company concerned? In my view, the answer must be that, if any C such summons is taken out, it must be regarded as taken out in those proceedings even though it asks for substantive relief. That, however, does not conclude the matter. If I am right in my conclusion that, in the case where proceedings have to be begun by writ, the business of advising is referable to the proceedings (if begun) for the purpose of deciding in what proceedings that business is to be D regarded as contentious business, then I can find no good ground for not applying the same reasoning to the case of advice given leading to the issue of a summons entitled "In the" proceedings begun by the petition. In my view, the business of giving such advice only becomes contentious business in such proceedings by virtue of the issue of such summons. It follows that, if no such summons is issued, the business of advising remains non-contentious business. E If the contrary view were to prevail, the result would be both inconvenient and odd. It would mean that the method of taxing the costs of obtaining the advice under head (a)†, that is, whether misfeasance proceedings should be begun, would be taxed under R.S.C., Appendix N, while the costs of obtaining advice under head (b)†, where proceedings, if taken, would have to be begun by writ, would be taxed under the Solicitors' Remuneration Order, 1983. I have not failed F only where a company is being wound-up compulsorily. It was argued that the presence of those items in Appendix N was a pointer to the conclusion that all charges by a solicitor for work done in a compulsory winding-up should be taxed under Appendix N. The argument is attractive, but I do not find it conclusive. It can be said with equal force that the items should not have been included in Appendix N at all.

G A further argument addressed to me was based on r. 192 of the Companies (Winding-up) Rules, 1949, which provides that in a county court all costs properly incurred in a winding-up by the court are chargeable on the lower scale in Appendix N. It was then said that the intention of the legislature must have been to place the taxation of costs in the county court and the taxation of H costs in the High Court on the same basis. If that had been the intention, it would have been easy to say so: but the introduction of r. 192 does not lead to the conclusion, as a necessary conclusion, that the intention of the legislature was as is suggested. It can be argued with much force that, by referring only to proceedings in a county court, the legislature intended that costs in the High Court should be dealt with on a different basis.

I As I have already said, I have found the whole matter one of great difficulty, and I recognise that a different view could well be entertained. Only one thing is certain, and that is that the position is far from clear. Whether or not all costs properly incurred in a winding-up by the High Court should be taxed under Appendix N is a matter of policy, on which it is not for me to pronounce. I

* In s. 13 (4) (a) of the Solicitors (Amendment) Act, 1956, and s. 86 (1) of the Solicitors Act, 1957.

† See p. 613, letter C, ante.

would, however, point out that, if it were to be decided that that policy should be followed, it could be achieved by a short amendment to the Companies (Winding-up) Rules, 1949. In the result the summons will be dismissed. A

Summons dismissed.

Solicitors: *Solicitor, Board of Trade* (for the applicant); *Stafford Clark & Co.* (the respondents). B

[Reported by R. D. H. OSBORNE, Esq., *Barrister-at-Law.*]

Re BACHARACH'S WILL TRUSTS. MINDEN v. BACHARACH AND OTHERS. C

[CHANCERY DIVISION (Vaisey, J.), November 19, 26, 1958.]

Will—Transposition of words—Income to be divided between testator's children and his wife—Subsequent trusts logically relating to children's shares—Difficulty of construction resolved by transposition of initial gifts to children and wife.

A testator gave his residuary estate to his trustee on trust for sale (subject to a restriction on selling his business without his wife's consent), and to stand possessed of the proceeds of such sale and his ready money and the investments representing the same (defined as his "residuary estate") on trust "to pay and apply the annual income arising therefrom to be divided into four equal parts one part to each of my children [R. and E.] and two parts to my wife . . . as shall survive me until the children shall attain the age of twenty-three years and if more than one child in equal shares and if and when each of my said children shall attain the age of twenty-three upon trust to pay and apply one quarter of my residuary estate to such child for his or her own use and benefit absolutely but if only one of my said children shall survive me and shall live to attain the age of twenty-three years then to pay and apply the half of my residuary estate to such child for his or her use and benefit absolutely". There followed a substitutional trust in favour of children of either of the said children who died in the testator's lifetime or before attaining the age of twenty-three, and finally a proviso that if both of the testator's children should die in his lifetime without leaving issue, the testator's "entire estate consisting of the four shares before mentioned shall be for the use and benefit of my said wife . . ." The testator left his widow and two children, both under twenty-three years of age, surviving him. On a question as to the nature of the wife's benefit, D

Held: the testator's wife took an absolute interest in one half of the residuary estate, the disposition in her favour constituting an indefinite gift of income, especially since (a) the wife's consent was required to the sale of the testator's business, (b) the wife was given the whole residuary estate on failure of the testator's issue, and (c) by the transposition of the phrases "two parts to my wife" and "one part to each of my children [R. and E.]", the difficulty of construction would disappear. E

Re Smith ([1947] 2 All E.R. 708), *Re Follett* ([1955] 2 All E.R. 22) and *Re Whitricks* ([1957] 2 All E.R. 467) considered. F

[As to the rules of construction in wills in special cases and the transposition of words, see 34 HALSBURY'S LAWS (2nd Edn.) 215, para. 272; and for cases on the subject, see 44 DIGEST 599, 600, 4246-4255.] G

Cases referred to:

- (1) *Re Smith, Veasey v. Smith*, [1947] 2 All E.R. 708; [1948] Ch. 49; [1949] L.J.R. 765; 2nd Digest Supp. H
- (2) *Love v. Norman Wright (Builders), Ltd.*, [1944] 1 All E.R. 618; [1944] K.B. 484; 113 L.J.K.B. 442; 170 L.T. 346; 2nd Digest Supp. I

A (3) *Re Follett, Barclays Bank, Ltd. v. Dovell*, [1955] 2 All E.R. 22; 3rd Digest Supp.

(4) *Re Whitrick, Sutcliffe v. Sutcliffe*, [1957] 2 All E.R. 467; 3rd Digest Supp.

Adjourned Summons.

B This originating summons was issued by the plaintiff, Ernest Minden, as sole executor and trustee of the will of the testator, Leo Bacharach, deceased, for the determination of the question (among others) whether on the true construction of the will two equal fourth parts of the residuary estate of the testator were held on trust:—(i) for the first defendant, Nora Bacharach, absolutely, or (ii) to pay the income thereof to the first defendant during her life, or (iii) to pay such income to the first defendant until both the second and third defendants, Robert Michael Bacharach and Evelyn Claire Bacharach (respectively), attained the age of twenty-three years, or (iv) to pay such income to the first defendant until one of the second and third defendants attained the age of twenty-three years, or (v) for the first defendant for some other and, if so, what interest.

G. M. Parbury for the plaintiff, sole executor and trustee.

D A. C. Sparrow for the first defendant, the widow.

A. A. B. Fuller for the second and third defendants, children of the testator by a former marriage.

Cur. adv. vult.

E Nov. 26. VAISEY, J., read the following judgment: The plaintiff in this action is the sole executor and trustee of the will of the testator, Leo Bacharach, which is dated Nov. 14, 1956. The testator died on Dec. 11, 1957, leaving a widow, the defendant, Nora Bacharach, and two children, issue of a former marriage, the defendants Robert Michael Bacharach and Evelyn Claire Bacharach, of whom the former is just of age and the latter is still an infant. His will was proved by the plaintiff on Apr. 3, 1958, and the net value of his estate was sworn as being upwards of £17,000.

F After bequeathing certain pecuniary legacies, the testator devised and bequeathed his residuary estate on trust for sale subject to a direction that his business of a leather factor's merchant should not be sold without his wife's consent and to stand possessed of the proceeds and resulting investments and property, called his residuary estate, on trust

G "to pay and apply the annual income arising therefrom to be divided into four equal parts one part to each of my children . . . and two parts to my wife Nora . . . as shall survive me until the children shall attain the age of twenty-three years and if more than one child in equal shares and if and when each of my said children shall attain the age of twenty-three upon trust to pay and apply one quarter of my residuary estate to such child for his or her own use and benefit absolutely but if only one of my said children shall survive me and shall live to attain the age of twenty-three years then to pay and apply the half of my residuary estate to such child for his or her use and benefit absolutely."

H Then follow two provisos. The first is that if either of his children should die in his lifetime or before attaining the age of twenty-three

I "leaving a child or children who shall survive him or her such child (sic) shall take and if more than one equally between them the share in my residuary estate which his her or their (sic) parents would have taken if such parent had survived me and lived to attain a vested interest "

under his will. The second proviso is that if both of the testator's said children should die in his lifetime without leaving issue his entire estate consisting of the four shares before mentioned should be for the use and benefit of the testator's said wife.

It is obvious that the passage of the will which I have quoted consists, especially at the beginning of the passage, of an extraordinary jumble of words for which it is difficult to account, for the probate includes a photograph of the original will which was a neatly typewritten document bearing every superficial indication of having been carefully prepared for signature. This summons concerns the two equal fourth shares in which the widow takes an interest under the will, and the question is, what interest? Several suggestions are made such as (i) that the widow takes the two shares absolutely; (ii) that she takes only a life interest in the income; and (iii) that she takes such income only until both the testator's children attain, or, alternatively, until one of them attains the age of twenty-three years. If either of suggestions (ii) or (iii) is adopted, the further question arises as to the destination of the two shares when the widow's interest in them comes to an end.

There is evidently something very wrong about the wording of the will. Something has been inadvertently omitted, or inadvertently inserted, or the words have been disarranged. The question is whether I can discover from the words as they stand what the testator's meaning was without speculating any further than was held to be permissible in *Re Smith, Veasey v. Smith* (1) ([1947] 2 All E.R. 708), for I have, of course, no power to rectify the document, or to do anything but construe it as it stands.

I have a strong impression amounting to a conviction that the widow was intended to take the two shares absolutely under an indefinite gift of income. That view seems to me to be supported by the circumstance that her consent is required to the sale of the testator's business, and by the absolute gift to her of the whole estate on failure of the testator's issue, and by the ingenious suggestion of the widow's counsel that the words "two parts to my wife Nora" should have preceded instead of following the words "one part to each of my children". If such a re-arrangement were made, the difficulty would disappear, for everything which came after the reference, in its new place, to the widow's two parts would be dealing appropriately and naturally with the children's two parts. I am not aware that the expedient of shuffling the words in a will to make them intelligible has ever been resorted to, but I do not see why it should not, in a proper case, be permitted. I have been referred to *Love v. Norman Wright (Builders) Ltd.* (2) ([1944] 1 All E.R. 618 at p. 620), where the words of a statute were transposed in order to make them make sense, or better sense, and, if this could be done in the case of a statute, it must surely be allowable in the case of a will. In holding that the widow takes her two shares absolutely, I am relying on *Re Smith* (1); *Re Follett, Barclays Bank, Ltd. v. Dovell* (3) ([1955] 2 All E.R. 22), and *Re Whirrick, Sutcliffe v. Sutcliffe* (4) ([1957] 2 All E.R. 467). If other re-arrangements of the words could have been suggested as producing an equally reasonable and probable disposition of the testator's estate, I should have held that an intestacy must result, for I would have no power to choose between alternatives in such a case.

I will declare that the construction of the will is as I have indicated. The plaintiff's costs and expenses as executor must be taxed, and the defendants' costs as between solicitor and client must be taxed, and such costs and expenses and such costs must be raised and retained or paid out of the testator's estate in due course of administration.

Order accordingly.

Solicitors: *A. & G. Tooth* (for the plaintiff and first defendant); *Hopwood, Mote & Leedham-Green* (for the second and third defendants).

[Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.]

A VIENTIT LTD. v. W. WILLIAMS & SON (BREAD STREET) LTD.

[CHANCERY DIVISION (Wynn-Parry, J.), October 24, 1958.]

Landlord and Tenant—Lease—Covenant against assignment without consent—Sub-lease—Covenant requiring consent of lessor or superior lessors—Consent unreasonably withheld by superior lessors—Sub-lessors willing to grant consent subject to consent of superior lessors being obtained—Declaration that consent unreasonably withheld by sub-lessors made in the absence of superior lessors.

A sub-lease of premises contained a covenant by the sub-lessees not to assign without the consent "of the lessor or superior lessors which shall not be unreasonably withheld in the case of a respectable and responsible assignee". The sub-lessees applied to their sub-lessors and to the superior landlords for consent to an assignment to a respectable and responsible assignee. The superior landlords refused consent in circumstances which made their refusal unreasonable. The sub-lessors were willing to grant consent to an assignment subject only to the consent of the superior landlords, but were informed by the superior landlords that to grant consent to the assignment without the superior landlords' consent would be a breach of a similar covenant in the lease to the sub-lessors. The sub-lessees sought a declaration that they were at liberty to assign the sub-lease. They made the sub-lessors defendants, but did not join the superior landlords.

Held: the unreasonable withholding of consent by the superior landlords did not make it reasonable for the sub-lessors to withhold their consent; accordingly a declaration that the failure or refusal of the sub-lessors to consent to grant a licence to the sub-lessees to assign the sub-lease was unreasonable would be made, notwithstanding that the superior landlords were not parties to the proceedings, but a declaration that the refusal of the superior landlords to consent was unreasonable would not be made in their absence.

[As to the unreasonable withholding of consent to assignment and to relief consequential thereon, see 23 HALSBURY'S LAWS (3rd Edn.) 633, 634, para. 1338; and for cases on the subject, see 31 DIGEST (Repl.) 424-427, 5515-5536, and 430, 431, 5565-5578.]

Cases referred to:

- (1) *Re Gibbs & Houlder Brothers & Co., Ltd.'s Lease, Houlder Brothers & Co., Ltd. v. Gibbs*, [1925] Ch. 575; 94 L.J.Ch. 312; 133 L.T. 322; 31 Digest (Repl.) 425, 5523.
- (2) *Bates v. Donaldson*, [1896] 2 Q.B. 241; 65 L.J.Q.B. 578; 74 L.T. 751; 60 J.P. 596; 31 Digest (Repl.) 424, 5521.

Adjourned Summons.

The plaintiffs, Vientit Ltd., issued an originating summons dated Aug. 14, 1958, to which W. Williams & Son (Bread Street) Ltd. were the sole defendants, by which the plaintiffs sought (i) a declaration that on the true construction of a sub-lease, dated Apr. 24, 1951, and made between the defendants (the sub-lessors) of the one part and the plaintiffs (the sub-lessees) of the second part, and in the events which had happened, the failure or the refusal of the defendants to consent to grant a licence to the plaintiffs to assign the sub-lease to S. Walters & Co. Ltd. was unreasonable, and (ii) a declaration that on the true construction of the sub-lease and in the events which had happened the refusal of J. Cowen & Co. Ltd. (the superior lessors of the defendants) to consent to the said assignment except subject to certain conditions was unreasonable, (iii) a declaration that notwithstanding such a refusal as aforesaid the plaintiffs were entitled, without any licence from the defendants or J. Cowen & Co. Ltd., to assign the sub-lease to S. Walters & Co. Ltd.

By an underlease dated Mar. 27, 1943, between J. Cowen & Co. Ltd. of the one part and the defendants of the other part the property comprised in the sub-lease next mentioned was demised by J. Cowen & Co. Ltd. to the defendants for

a term of twenty-one years from Mar. 25, 1943. This underlease contained a covenant by the defendants in the same terms as those of cl. 12 of the sub-lease next stated, save that the consent required was that "of the company" (viz., the superior lessors, J. Cowen & Co. Ltd.) and not that of "the lessor or superior lessors". By a sub-lease dated Apr. 24, 1951, the defendants granted to the plaintiffs a sub-lease of first floor premises situate at No. 1, Berners Street, Oxford Street, for a term commencing on Apr. 25, 1951, and ending on Mar. 22, 1964. By cl. 12 of that sub-lease the plaintiffs covenanted

"... not at any time during the said term to assign part with possession of underlet lend deal with or grant any exclusive right of user of the demised premises or any part thereof without the previous consent in writing of the lessor or superior lessors which shall not be unreasonably withheld in the case of a respectable and responsible assignee or underlessee ..."

By deed dated Mar. 25, 1957, the plaintiffs granted an underlease to Bonny Bodices Ltd. of five rooms of the first floor premises at No. 1, Berners Street, for a term commencing on Mar. 25, 1956, and ending on Mar. 19, 1964. For this they obtained the consent of the defendants and of the superior lessors. This underlease contained a covenant against assignment etc. without consent similar to that contained in cl. 12 of the sub-lease.

The plaintiffs wished to assign the remainder of the term granted to them by the sub-lease to S. Walters & Co. Ltd., who were, as was stated in evidence in an affidavit filed on behalf of the plaintiffs, a respectable and responsible assignee. Correspondence for the purpose of obtaining the necessary consents passed between the solicitors for the plaintiffs and defendants and those of J. Cowen & Co. Ltd., the superior lessors. By letters of June 25 and 30, 1958, the solicitors of J. Cowen & Co. Ltd. stated that that company were not prepared to grant a consent to an assignment by the plaintiffs to S. Walters & Co. Ltd. of the residue of the term of their (the plaintiffs') lease unless S. Walters & Co. Ltd. entered into a covenant with J. Cowen & Co. Ltd. that they would not assign, underlet or consent to any parting with possession of or sharing of and would not consent to Bonny Bodices Ltd. assigning, underletting or parting with possession of or sharing of the said premises, such covenant to be guaranteed by Mr. Walters, a director of S. Walters & Co. Ltd. By a letter dated July 17, 1958, sent to the solicitors of J. Cowen & Co. Ltd., the plaintiffs' solicitors stated that the conditions subject to which their clients were prepared to grant a licence were unreasonable and accordingly that it was intended to take legal proceedings to obtain the appropriate declaration. J. Cowen & Co. Ltd. had not at any time withdrawn the condition subject to which they were prepared to consent to the assignment.

The defendants through their solicitors had intimated to the plaintiffs that the defendants were willing to consent to the assignment if their superior lessors, J. Cowen & Co. Ltd., were also willing so to consent. By a letter of July 30, 1958, the defendants' solicitors were informed by the solicitors of J. Cowen & Co. Ltd. that they (the defendants) were prohibited by cl. 12 of their lease from granting to the plaintiffs the licence to assign unless they had obtained the consent from J. Cowen & Co. Ltd., and that if the defendants did in fact grant such licence without the consent of J. Cowen & Co. Ltd., they would be committing a breach of their own lease. The defendants were aware that the condition imposed by J. Cowen & Co. Ltd. was unacceptable to the plaintiffs. The defendants remained willing to grant the licence subject to the consent of J. Cowen & Co. Ltd., and contended that in the circumstances it was not unreasonable on their part to refuse to grant the licence without that consent.

Leonard Lewis for the plaintiffs, the sub-lessees.

C. G. Heath for the defendants, the sub-lessors.

A **WYNN-PARRY, J.:** The first point with which I must deal is whether or not the act of the superior lessors, J. Cowen & Co. Ltd., in refusing permission to the defendants to assign to S. Walters & Co. Ltd., is reasonable or unreasonable. In my judgment, having regard to the Court of Appeal case of *Re Gibbs & Houlder Brothers & Co., Ltd.'s Lease, Houlder Brothers & Co., Ltd. v. Gibbs* (1) ([1925] Ch. 575), the refusal was unreasonable. In that case it was held that the refusal of the licence was unreasonable, as the reason given for it was one which had no reference either to the personality of the proposed assignee or to the subject-matter of the lease. In the course of his judgment, POLLOCK, M.R., said ([1925] Ch. at p. 582):

C “In *Bates v. Donaldson* (2) ([1896] 2 Q.B. 241 at p. 247) A. L. SMITH, L.J., says: ‘It is not, in my opinion, the true reading of this clause that the permission can be withheld in order to enable the lessor to regain possession of the premises before the termination of the term. It was in my judgment inserted alio intuitu altogether, and in order to protect the lessor from having his premises used or occupied in an undesirable way or by an undesirable tenant or assignee, and not in order to enable the lessor to, if possible, coerce a tenant to surrender the lease so that the lessor might obtain possession of the premises.’ His judgment differs, in some important respects, from the judgment which had been delivered by KAY, L.J., in the same case. For my part, I agree with A. L. SMITH, L.J., and I think that one must look at these words in their relation to the premises, and to the contract made in reference to the premises between the lessor and lessee . . .”

E WARRINGTON, L.J., said ([1925] Ch. at p. 585):

“When you look at the authorities—I do not propose to go through them—this, at any rate, is plain, that in the cases in which an objection to an assignment has been upheld as reasonable it has always had some reference either to the personality of the tenant, or to his proposed user of the property.”

F There is no evidence before me that the intended assignee is not respectable and responsible and it follows therefore that the action of the superior lessors in refusing their consent is unreasonable.

G The question then arises whether I can proceed to deal with the matter in the absence of the superior lessors. It is said that this is a case to which s. 56 (1) of the Law of Property Act, 1925, applies. That sub-section provides:

“A person may take an immediate or other interest in land or other property, or the benefit of any condition, right of entry, covenant or agreement over or respecting land or other property, although he may not be named as a party to the conveyance or other instrument.”

H The superior lessors were well aware of the dispute but so far from taking any steps with a view to being made a party to these proceedings for the purpose of invoking s. 56 (1) they have in correspondence disclaimed the existence of any contractual right between them and the plaintiffs in this summons. It appears to me, therefore, that it is quite unnecessary for the purposes of this judgment to consider further whether s. 56 (1) has any application in this case.

I It was argued on behalf of the defendants that, although it would have been possible under R.S.C., Ord. 54A, to make a declaration on the summons, I ought not to make the second declaration*, for which the summons asks, in the absence of the superior lessors.

It was pointed out that r. 1 of Ord. 54A is in very general terms and that on the face of it r. 2 is also couched in very general terms. Rule 2 provides: “The court or a judge may direct such persons to be served with the summons as they or he may think fit.” There must, however, be some limit to the class of persons

* The terms of this are stated at p. 621, letter I, ante.

who can be joined on a summons asking for a declaration. The answer is to be found in the note to R.S.C., Ord. 55, r. 5, in the ANNUAL PRACTICE. That makes it clear to my mind that the persons who can be so joined are limited to parties who have some interest which can be enforced in a court of law under the document in question. Neither the plaintiffs nor the defendants wanted to join the superior lessors. The defendants, I apprehend, could have done so by bringing third-party proceedings, since that procedure is open on an originating summons. The plaintiffs could have done so by adding them as defendants. In both cases it was said that there was the not insubstantial question of costs which would arise.

The provision in cl. 12 of the sub-lease of Apr. 24, 1951, which I have to construe, represents the contractual rights between these two parties. I think that I am justified in dealing with the matter as between the two parties now before me. Now the principle that should be applied is whether the defendants' consent has been unreasonably withheld within the meaning of cl. 12. If the defendants, the sub-lessors, have unreasonably withheld their consent, then the plaintiffs would be entitled to an order that they might assign without the defendants' consent; and it must equally follow, as between the parties to this summons, that if the superior lessors were acting unreasonably (as I hold that they have done in refusing to give consent), then the defendants cannot now refuse to give their consent in reliance on the refusal of the consent of their superior lessors. There is the further question whether, in the circumstances, the defendants are entitled to withhold their consent on the ground that, because of the refusal of the superior lessors to consent, they, the defendants, will be at peril if they give their consent. I think that the defendants are not so entitled, because the continued refusal by the defendants to give their consent is in itself unreasonable, as the superior lessors were (as I have held) unreasonable in refusing their consent.

An argument was put forward on the construction of the words "deal with" where they appear in cl. 12 "not at any time . . . assign part with possession of underlet land deal with or grant any exclusive right of user . . ." The submission was that the words "deal with" did not include the giving of a licence to assign, but meant creating some proprietary title or the giving in some way the use of the land. There appears to be no authority on the point and I do not propose to resolve it. I have construed the clause so far as is material for the first part of my judgment and I shall assume that "deal with" as used in cl. 12 includes the granting of a licence to assign.

The plaintiffs are entitled to some relief, but I am not prepared to grant the second declaration* asked for in the summons, because it is not the practice of the court to grant a declaration in the absence of the party against whom the declaration is sought or to grant a declaration as to the conduct of a party not before it. It is sufficient for the plaintiffs' purpose that I have clearly expressed my view that the refusal of the superior lessors to consent to the assignment is unreasonable. I will make a declaration in the plaintiffs' favour in the form of the first declaration sought on the basis that the refusal of the superior lessors to grant a licence constitutes no excuse for the refusal of the defendants on their part to grant a licence.

Declaration accordingly.

Solicitors: *Fletcher, Napper & Co.* (for the plaintiffs, the sub-lessees); *Biddle, Thorne, Welsford & Barnes* (for the defendants, the sub-lessors).

[Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.]

* This is printed at p. 621, letter I, ante.

A

Re HASTINGS (No. 2).

[QUEEN'S BENCH DIVISION (Lord Parker, C.J., Hilbery and Diplock, JJ.), November 4, 21, 1958.]

Habeas Corpus—Practice—Application for habeas corpus in criminal matter—Refusal of application by Divisional Court of Queen's Bench Division—Second application to differently constituted Divisional Court of same Division—Whether second or subsequent application should be heard.

B

An applicant for a writ of habeas corpus in a criminal matter who has once been heard by a Divisional Court of the Queen's Bench Division is not entitled to be heard a second time by another Divisional Court in the same Division (see p. 635, letter H, post), since a decision of a Divisional Court of the Queen's Bench Division, when sitting to hear an application for a writ of habeas corpus in a criminal matter, is equivalent to the decision of all the judges of the Division, just as the decision of one of the old common law courts sitting in banc was the equivalent of the decision of all the judges of that court (see p. 635, letters F and B, post).

C

Dictum of PARKE, B., in *Re Cobbett* ((1845), 5 L.T.O.S. at p. 130, cited at p. 631, letter E, post) applied.

D

Dictum of LORD HALSBURY, L.C., in *Cox v. Hakes* ((1890), 15 App. Cas. at p. 514) not followed; dictum of DENNING, L.J., in *Ex p. Chapple* ((1950), 66 (pt. 2) T.L.R. at p. 936) criticised.

QUAERE whether an applicant for a writ of habeas corpus in a criminal matter is entitled, during term time as distinct from in vacation, to go from judge to judge of the Queen's Bench Division (see p. 635, letter I, and p. 633, letters H and I, post).

E

Eshugbayi Eleko v. Nigeria Government (Administering Officer) ([1928] A.C. 459) and *The State (Dowling) v. Kingston (No. 2)* ([1937] I.R. 699) considered.

F

[**Editorial Note.** The judgment in this case traces the transfer of jurisdiction in regard to the issue of the writ of habeas corpus from the old courts of common law to the High Court (see pp. 628, letter H, to 631, pp. 634, 635, post). In this connexion it may be noted that it has been held that the Court of Appeal has no original jurisdiction to hear an application for a writ of habeas corpus, and that such an application will not be entertained if made to the Lord Chief Justice, as a judge of the High Court, when he is sitting as a member of the Court of Appeal (*Ex p. Le Gros* (1914), 30 T.L.R. 249).

G

As to the courts or judges to whom application for habeas corpus may be made, and as to renewal of an application, see 11 HALSBURY'S LAWS (3rd Edn.) 38, 39, paras. 67-69; as to appeals in regard to applications for writs of habeas corpus in criminal causes or matters, see *ibid.*, 49, para. 97.]

H

Cases referred to:

- (1) *Cox v. Hakes*, (1890), 15 App. Cas. 506; 60 L.J.Q.B. 89; 63 L.T. 392; 54 J.P. 820; *revsg.* S.C. sub nom. *Ex p. Cox (Bell)*, (1887), 20 Q.B.D. 1; *restg.* S.C., sub nom. *Ex p. Cox (Bell)*, 19 Q.B.D. 307; 16 Digest 250, 508.
- (2) *Ex p. Partington*, (1845), 13 M. & W. 679; 2 Dow. & L. 650; 14 L.J.Ex. 122; 9 J.P. 443; 9 Jur. 92; 153 E.R. 284; 16 Digest 258, 611.
- (3) *Eshugbayi Eleko v. Nigeria Government (Administering Officer)*, [1928] A.C. 459; 97 L.J.P.C. 97; 139 L.T. 527; Digest Supp.
- (4) *Ex p. Chapple*, (1950), 66 (pt. 2) T.L.R. 932; 2nd Digest Supp.
- (5) *Wood's Case*, (1771), 2 Black. W. 745; 96 E.R. 436.
- (6) *Jenkes's Case*, (1676), cited 2 Swan. at pp. 12, 43; 6 State Tr. 1190; 36 E.R. 518, 524; 16 Digest 256, 577.
- (7) *R. v. Shebbeare*, (1758), 1 Burr. 460; 97 E.R. 403; 16 Digest 256, 578.
- (8) *R. v. Mead*, (1758), 1 Burr. 541; 2 Keny. 279; 97 E.R. 440; 16 Digest 256, 580.

I

- (9) *R. v. Clarke*, (1758), 1 Burr. 606; 97 E.R. 471; 16 Digest 262, 677. A
 (10) *Crowley's Case*, (1818), 2 Swan. 1; Buck. 264; 36 E.R. 514; 16 Digest 262, 666.
 (11) *Hobhouse's Case*, (1820), 3 B. & Ald. 420; 1 State Tr. N.S. App. 1346; 106 E.R. 716; 16 Digest 248, 464.
 (12) *Re Cobbett*, (1845), 5 L.T.O.S. 130; 16 Digest 258, 612.
 (13) *Secretary of State for Home Affairs v. O'Brien*, [1923] A.C. 603; 92 L.J.K.B. B 830; 129 L.T. 577; 87 J.P. 174; Digest Supp.
 (14) *The State (Dowling) v. Kingston (No. 2)*, [1937] I.R. 699.

Application for habeas corpus.

The applicant, Edward Thomas Hastings, moved for the issue of a writ of habeas corpus directed to the respondent, the Governor of Liverpool Gaol, the applicant being then detained in Liverpool Gaol undergoing a sentence of four years' corrective training. The ground of the application was that no valid sentence had been passed on the applicant. The present application was the second application made by the applicant to a Divisional Court of the Queen's Bench Division for the issue of a writ of habeas corpus, and was made on the same grounds and on the same evidence as the previous application which was refused (see [1958] 1 All E.R. 707). The judges constituting the Divisional Court to whom the present application was made were different judges from those who constituted the Divisional Court to whom the previous application had been made on Mar. 7, 1958, and the question arose whether the present court had jurisdiction and were bound to hear the second application for a writ. The relevant facts appear in the judgment of the court delivered by LORD PARKER, C.J. E

N. McL. Butter for the applicant.

The Solicitor-General (Sir Harry Hylton-Foster, Q.C.) and Rodger Winn for the respondent.

Cur. adv. vult.

Nov. 21. LORD PARKER, C.J.: The judgment which I am about to read is the judgment of the court in the preparation of which we all collaborated. F

In these proceedings counsel for the applicant moves for a writ of habeas corpus to bring up the body of one Edward Thomas Hastings, at present detained in Liverpool Gaol undergoing a sentence of four years' corrective training, with a view to his being discharged. The ground of the application is that no valid sentence has ever been passed on him. What happened was this. The applicant was convicted at the Liverpool Crown Court on five counts. The first count was a count of larceny as a bailee, a felony, the other counts were for misdemeanours, obtaining money by false pretences and fraudulent conversion. The learned recorder in passing sentence said this: G

"Edward Thomas Hastings, you have been convicted on the plainest evidence of deliberate, calculated and systematic frauds. Those frauds have not only affected companies well able to sustain loss but have cruelly brought grave financial burdens on little men which it will be difficult for them to bear. This is by no means the first time you have been convicted of dishonesty. You are a menace to the integrity and health of the commercial community. You will go to prison for four years' corrective training." H

The recorder did not say "concurrent on each count" and the sentence indorsed on the indictment was merely four years' corrective training, again without any express statement that it was on each count to run concurrently. The applicant was granted leave to appeal to the Court of Criminal Appeal against conviction on three counts including the count for felony and in the result that count was quashed*. I

* On Dec. 18, 1957; see [1958] 1 All E.R. at p. 708, letters D, E.

A In these circumstances the argument sought to be adduced to this court in support of the application for a writ of habeas corpus is that the sentence was a general sentence on the five counts and that, one count having been quashed, there is no legal sentence applicable to the four remaining counts and that accordingly there is no valid authority for the applicant's detention.

B This, however, is not the first application for the writ. An application was heard on Mar. 7, 1958*, by a Divisional Court (consisting of LORD GODDARD, C.J., STREATFIELD, J., and SLADE, J.). The court refused the writ, holding that as a matter of construction the words used by the learned recorder amounted to concurrent sentences of four years' corrective training on each count and that accordingly the quashing of one count had no effect on the sentence, which remained a valid sentence. The applicant then appealed to the Court of Appeal who refused to entertain the appeal on the ground that it arose in a criminal cause or matter in which they had no jurisdiction†. The applicant then renewed his application to a Divisional Court consisting of three different judges, it being contended that he had the right to go from judge to judge and from one Divisional Court of three judges to another Divisional Court of three different judges. The court being of opinion that there was an arguable point gave leave to move D but subject to the court being satisfied that they had jurisdiction to hear and were bound to hear a fresh application. We should add that the present application is on exactly the same grounds and on the same evidence as in the previous application.

E The Solicitor-General for the respondent has contended first that, contrary to what has been generally presumed, an applicant has never had a right to go, as it is said, from judge to judge except when the court is not sitting. Secondly, and in the alternative, that though prior to the Supreme Court of Judicature Act, 1873, an applicant could go from court to court, for example, from the Court of Queen's Bench to the Court of Common Pleas, yet at any rate since 1880, when by Order in Council the Queen's Bench, Common Pleas and Exchequer Divisions of the High Court were fused, an applicant who has been to a Queen's Bench F Divisional Court has exhausted his rights in regard to all the judges of the Queen's Bench Division.

G It is undoubtedly assumed today to be the law that an applicant for a writ of habeas corpus in a criminal matter—and we are only dealing with criminal matters—can apply to every judge in turn. In *Cox v. Hakes* (1) ((1890), 15 App. Cas. 506) one of the leading authorities on habeas corpus, LORD HALSBURY, L.C., said (*ibid.*, at p. 514):

“For a period extending as far back as our legal history, the writ of habeas corpus has been regarded as one of the most important safeguards of the liberty of the subject. If upon the return to that writ it was adjudged

H * It is reported in [1958] 1 All E.R. 707.

† The appeal was heard on July 28, 1958, before HODSON, MORRIS and SELLERS, L.J.J. It was argued that the appeal did not arise from a criminal cause or matter within s. 31 (1) (a) of the Supreme Court of Judicature (Consolidation) Act, 1925, because there was no sentence in existence, the conviction of the applicant on the first count having been quashed (*cf.*, statement of facts, [1958] 1 All E.R. at p. 708). The Court of Appeal dismissed the appeal on the grounds stated above, applying the decisions in *Ex p. Woodhall* ((1888), 20 Q.B.D. 832), *R. v. Governor of Maidstone Prison, Ex p. Maguire* ((1925), 95 L.J.K.B. 55), and *Amand v. Secretary of State for Home Affairs* ([1942] 2 All E.R. 381). In the course of his judgment MORRIS, L.J., said “the present case is different from *Ex p. Woodhall* and arises in different circumstances; but the same considerations apply. If we had been empowered to hear this appeal, we would have had to hear debate on questions whether the Divisional Court were right in their decision as to the effect of what had taken place in the criminal court: such questions as the following—What was the authority for holding a man convicted of offences and now imprisoned? Whether he was properly sentenced? Whether there was proper warrant to detain him in prison? All those questions are essentially questions that arise out of and in a criminal matter.”

I

that no legal ground was made to appear justifying detention, the consequence was immediate release from custody. If release was refused, a person detained might—see *Ex p. Partington* (2) ((1845), 13 M. & W. 679)—make a fresh application to every judge or every court in turn, and each court or judge was bound to consider the question independently and not to be influenced by the previous decisions refusing discharge.”

Again, in the more recent case before the Judicial Committee of *Eshugbayi Eleko v. Nigeria Government (Administering Officer)* (3) ([1928] A.C. 459), LORD HALSHAM, L.C., said (*ibid.*, at p. 468):

“If it be conceded that any judge has jurisdiction to order the writ to issue, then in the view of their Lordships each judge is a tribunal to which application can be made within the meaning of the rule, and every judge must hear the application on the merits. It follows that, although by the Judicature Act the courts have been combined in the one High Court of Justice, each judge of that court still has jurisdiction to entertain an application for a writ of habeas corpus in term time or in vacation, and that he is bound to hear and determine such an application on its merits notwithstanding that some other judge has already refused a similar application.”

Further, in *Ex p. Chapple* (4) ((1950), 66 (pt. 2) T.L.R. 932), DENNING, L.J., said (*ibid.*, at p. 936):

“In the year 1679, when the writ of habeas corpus was given its modern efficiency, Parliament conferred the power of issuing it, not only on the judges of the King’s Bench, who had theretofore issued it, but also on the Lord Chancellor, the Lord Keeper, the judges of the Common Pleas, and the barons of the Exchequer. Indeed, s. 10 of the Habeas Corpus Act, 1679, provides: ‘That it shall and may be lawful to and for any prisoner and prisoners as aforesaid, to move and obtain his or their habeas corpus as well out of the High Court of Chancery or Court of Exchequer, as out of the Courts of King’s Bench or Common Pleas or either of them’; so that in those days a subject could apply to any of the superior courts of the realm to issue a writ of habeas corpus. Not only was the subject entitled to apply for the writ, but the judges themselves were obliged to issue it in proper cases and were subject to severe penalties if they did not do so. If any court or judge refused to issue it, the applicant had no right to appeal to a higher court, but he could go from court to court and from judge to judge without being met by a plea of *res judicata*.”

Counsel for the respondent, however, points out that the views of LORD HALSBURY and of DENNING, L.J., were expressed obiter and that *Eleko v. Nigeria Government* (3), though persuasive authority, is not binding on this court. He accordingly asks us to look at the matter afresh.

We think that it is clear that at any rate since the end of the eighteenth century an applicant has always had the right to apply successively to every tribunal competent to issue a writ of habeas corpus. The problem thus involves ascertaining first what tribunals had that power before the passing of the Judicature Act, 1873, and secondly on what tribunals that power has devolved as a result of that Act and its successors, in particular the Supreme Court of Judicature (Consolidation) Act, 1925. In considering the early history of the matter it is relevant to bear in mind that the common law courts of King’s Bench, Common Pleas and Exchequer functioned as courts only in term time and that each of the four legal terms was one of brief duration. Consequently the greater part of the year fell during the legal vacations although the judges of the courts might be sitting under commissions of assize, oyer and terminer and general gaol delivery or hearing cases in Middlesex at *nisi prius*. Furthermore, each of the common law courts sat in banc and no individual judge of the court had any general power to act for the court. Even a decision at *nisi prius* only became a judgment

A of the court on motion to the court on the fourth day of the term next following the verdict *ad nisi prius*.

The position prior to the passing of the Habeas Corpus Act, 1679*, is far from clear. It is noteworthy, however, that in the Habeas Corpus Act, 1640, s. 6†, it was provided as follows:

B “ . . . if any person shall hereafter be committed, restrained of his liberty,
or suffer imprisonment, by the order or decree of any such Court of Star-
C Chamber, or other court aforesaid, now or at any time hereafter, having or
pretending to have the same or like jurisdiction, power, or authority, to
commit or imprison as aforesaid, or by the command or warrant of the
King’s Majesty, his heirs or successors, in their own person, or by the
command or warrant of the council board, or of any of the lords or others of
His Majesty’s Privy Council, that in every such case every person so com-
mitted, restrained of his liberty, or suffering imprisonment, upon demand or
motion made by his counsel, or other employed by him for that purpose, unto
the judges of the Court of King’s Bench or Common Pleas, in open court
shall, without delay, upon any pretence whatsoever, for the ordinary fees
usually paid for the same, have forthwith granted unto him a writ of habeas
D corpus to be directed generally unto all and every sheriffs, gaoler, minister,
officer, or other person in whose custody the party committed or restrained
shall be, and the sheriffs, gaoler, minister, officer, or other person in whose
custody the party so committed or restrained shall be, shall at the return
of the said writ, and according to the command thereof, upon due and
E convenient notice thereof given unto him, at the charge of the party who
requireth or procureth such writ, and upon security by his own bond given,
to pay the charge of carrying back the prisoner, if he shall be remanded by
the court to which he shall be brought, as in like cases hath been used, such
charges of bringing up and carrying back the prisoner to be always ordered
by the court, if any difference shall arise thereabout, bring, or cause to be
F brought, the body of the said party so committed or restrained unto and
before the judges or justices of the said court from whence the said writ shall
issue, in open court, and shall then likewise certify the true cause of such his
detainor or imprisonment, and thereupon the court, within three court-days
after such return made and delivered in open court, shall proceed to examine
and determine whether the cause of such commitment appearing upon the
said return be just and legal, or not, and shall thereupon do what to justice
G shall appertain, either by delivering, bailing, or remanding the prisoner;
and if any thing shall be otherwise wilfully done, or omitted to be done by
any judge, justice, officer or other person aforementioned, contrary to the
direction and true meaning hereof, that then such person so offending, shall
H forfeit to the party grieved his treble damages, to be recovered by such
means, and in such manner as is formerly in this Act limited and appointed
for the like penalty to be sued for and recovered.”

I The reference is always to the judges sitting as a court and an open court and not to them as individual judges. This was an Act to extend the right to the writ of habeas corpus, not to diminish the rights to it previously enjoyed by the subject. If before the passing of this Act the subject had had any recognised right to apply to each individual judge in turn or to an individual judge without having to apply to the judges sitting as a court, it is difficult to suppose that the Act would have been framed in the terms in which we find it enacted.

The Court of King’s Bench unquestionably had the power to issue the writ of habeas corpus *ad subjiciendum* in criminal and supposed criminal matters in term time. It appears from the judgment of BLACKSTONE, J., in *Wood’s Case* (5)

* 31 Car. 2 c. 2 (6 HALSBURY’S STATUTES (2nd Edn.) 83.)

† 16 Car. 1 c. 10 (4 HALSBURY’S STATUTES (2nd Edn.) 136).

((1771), 2 Black. W. 745) that the Court of Common Pleas had by 1679 successfully asserted a similar general power, originally by making use of the legal fiction that the applicant was a party to a current suit in the Common Pleas, a fiction that was dropped after the passing of the Habeas Corpus Act, 1640. The Court of Exchequer had not, by 1679, acquired any general power to issue the writ, but made use of it in the case of persons genuinely privileged to be sued only in the Court of Exchequer. There appears to be no trace, however, of any of these courts exercising the power to issue the writ except in term time and on motion to the court sitting in banc. According to the views of COKE and of HALE the writ could issue out of Chancery in term time or in vacation, although LORD NOTTINGHAM, L.C., in *Jenkes's Case* (6) (1676) (cited 2 Swan. at pp. 12, 43; 6 State Tr. 1190) took the contrary view, a decision which has been described as being the cause of the passing of the Act of 1679.

The Act of 1679 was a procedural Act. It applied only to persons detained for criminal or supposed criminal matters and was directed specifically to the abuse of detaining persons in prison without bail, and without bringing them to trial. So far as is relevant to the present inquiry it did two things which had much wider consequences: (1) by s. 9 it provided that in criminal or supposed criminal matters the High Court of Chancery and the Court of Exchequer as well as the courts of King's Bench and Common Pleas should have power to issue the writ of habeas corpus ad subjiciendum; and (2) by s. 2 it provided that in criminal or supposed criminal matters any judge of those courts could in vacation act for the court of which he was a member, and, if on return of the writ he found that the case was bailable, could release the prisoner on his recognisances to take his trial in the Court of King's Bench the term following, or at the next assize sessions or general gaol delivery to be held in the place where the offence of which the prisoner was charged was cognisable.

The powers conferred by this Act on single judges were thus limited in three respects, first as to the type of case in which they could be exercised, namely, criminal and supposed criminal matters, secondly, as to the powers of the judge, namely, to bail the prisoner, and thirdly, as to the time in which they could be exercised, namely, in vacation. It seems that by the middle of the eighteenth century the first two limitations on the powers of a single judge had ceased to operate in practice. By 1758 the Court of King's Bench treated the writ of habeas corpus as issuable, in all cases not merely criminal and supposed criminal cases, by a single judge in vacation, and the power of the judge on the return as extending to discharging and not merely to bailing the prisoner (see *R. v. Shebbeare* (7) ((1758), 1 Burr. 460), *R. v. Mead* (8) ((1758), 1 Burr. 541), *R. v. Clarke* (9) ((1758), 1 Burr. 606). This was no doubt a natural extension of the statutory power, since if the judge on the return of the writ in a supposedly criminal case was to find that it was not a criminal case and that the detention was unlawful it would not be consonant with the libertarian views of common lawyers in the eighteenth century that the prisoner should not be ordered to be discharged.

The Habeas Corpus Act, 1816*, gave statutory recognition to these extensions of the powers of a single judge in vacation which had already been adopted by the Court of King's Bench and extended them to judges of the Common Pleas and the Exchequer. It also gave these judges and their respective courts in term time the power to inquire into the truth of the return. It did not apply to the Court of Chancery which was slower to assert the general power to issue writs of habeas corpus except as authorised by the Act of 1679, but in *Crowley's Case* (10) ((1818), 2 Swan. 1) LORD ELDON, L.C., after an elaborate examination of the history of the matter, held that the Lord Chancellor had the general power to issue writs of habeas corpus in term or in vacation.

* 6 HALSBURY'S STATUTES (2nd Edn.) 96. See further as regards the Act of 1816, which was directed to non-criminal cases, 11 HALSBURY'S LAWS (3rd Edn.) 29.

- A But while the limits on the powers of a single judge of the common law courts granted by the Act of 1679 were in these two respects swept away by the practice of the King's Bench Court in the eighteenth century and finally by the Act of 1816, there is no suggestion that we can find in the cases or the writings of lawyers that the third limitation, namely, that a single judge could issue the writ in vacation only, was ever impinged on. Thus in CHITTY'S CRIMINAL LAW (2nd Edn.) (1826), Vol. 1, at p. 124, it is stated that it

"must be obtained by motion to the court in term time, and by application to a judge in vacation."

- The practice is also so stated in the judgment of ABBOTT, C.J., in *Hobhouse's Case* (11) ((1820), 3 B. & Ald. 420). We think it is established that in term time the writ was issuable only by the court sitting in banc. Except in vacation a single judge had no power to issue it.

- There is no doubt that in term time an applicant could go from court to court, that is, from King's Bench to Common Pleas, from Common Pleas to Exchequer, from Exchequer to Chancery, and it may well be that in vacation he could go from judge to judge even of the same court. But it appears clear that he could not apply twice to the same court on the same facts for while the decision whether or not to issue a writ of habeas corpus is not a judgment so that there is no res judicata it is not a writ of course (*Hobhouse's Case* (11)) and the decision whether or not to issue it involves the exercise of a judicial discretion. The court must have an inherent jurisdiction to refuse, having once exercised its discretion, to hear the same matter argued again. Thus in *Re Cobbett* (12) ((1845), 5 L.T.O.S. 130), an application had been refused by the Court of Queen's Bench and again by the Court of Exchequer. It was then made a second time to the Court of Exchequer when PARKE, B., in the course of the argument (*ibid.*, at p. 130) said: "You have been heard once; we cannot enter into this matter again". The common law courts, as we have already mentioned, prior to the Supreme Court of Judicature Act, 1873, sat in banc, all members of the court available in London sitting together, although there might on occasions be absentees. But the decision was the decision of the court, and there is no suggestion to be found in any of the cases that the absence of one or more members would enable an applicant to apply again to the same court when it was differently constituted.

- What, then, is the historical foundation for the dictum of LORD HALSBURY, L.C., in *Cox v. Hakes* (1) (15 App. Cas. 506)? He refers to *Ex p. Partington* (2) (13 M. & W. 679; 9 Jur. 92). In that case an application for the writ had been refused by the Court of Queen's Bench. The application was renewed before and refused by the Lord Chief Baron and was then renewed before the Court of Exchequer. PARKE, B., giving the judgment of the court refusing the application, said this (9 Jur. at p. 94):

- "The defendant, however, had a right to take the opinion of the court as to the propriety of the imprisonment; and, therefore, we have thought it proper to examine attentively the provisions of the statute [under which the applicant was in custody] without considering ourselves as concluded by these decisions. But we are all of opinion, that the defendant is not entitled to his discharge; and we entirely agree in the judgment of the Court of Queen's Bench, which was approved of by the Lord Chief Baron, and are satisfied of the correctness of the reasons stated to us to have been assigned by LORD DENMAN for that judgment."

PARKE, B., therefore was only expressly affirming the right to go from one court to another. That the application to the Lord Chief Baron was made in vacation is not expressly stated, but it was anyhow made in chambers, and in view of what we have already indicated as to the practice we think it reasonably certain that it was made in vacation. In the report of the case in 9 Jur. at p. 93, however, there appears an interjection of POLLOCK, C.B., to whom the previous

application had been made in these words: "Yes, and of every judge", meaning that a person is entitled to take the opinion of every judge. This interjection is quite consistent with its being a reference to what might take place in vacation, and we think that it must have been so intended. A

Re Cobbett (12) was decided in the same year. In the course of that case, in addition to the observations to which we have already referred, PARKE, B., said (5 L.T.O.S. at p. 130): B

"You can go to another court in which you have not been heard. I believe this matter has been heard in the Queen's Bench as well as here [the Court of Exchequer], but as it is an application for a habeas corpus, you are entitled to the judgment of each court and of each judge; and therefore you may go to the Court of Common Pleas. If this was the only court in which you could be heard we might then, perhaps under the circumstances, re-hear the case." C

There is here the only other pre-Judicature Act reference that we can find to an applicant's being entitled to the judgment of each judge, but here again PARKE, B., may be referring only to the time when the court is not sitting.

In *Cox v. Hakes* (1) in the Court of Appeal under the title *Ex p. Cox (Bell)* ((1887), 20 Q.B.D. 1), LORD ESHER, M.R., said (*ibid.*, at p. 13): D

"It was argued that, if such an appeal lies*, a prisoner would be deprived of the privilege which he had under the old practice of applying, where his application for a habeas corpus was refused by one judge, to all the other judges in succession. It is not correct to say that under the old system there could be an application to all the judges in succession. There could be an application to all the courts in succession." E

It is true that the decision of the Court of Appeal was reversed by the House of Lords (15 App. Cas. 506), but none of their Lordships dissented from LORD ESHER's statement, unless it be LORD HALSBURY, L.C., in the observations to which we have already referred. It is to be observed that neither LORD BRAMWELL nor LORD HERSCHELL subscribed to LORD HALSBURY's observations. F

"However, as has been said, we have got on without such appeals hitherto, and might continue to do so and thrive. I say 'without such appeals', for, with all respect, I cannot agree that going first to a judge of one court, and then, on being refused by the judge, going to a court, and, on being refused by one court, going to another, was or is an appeal. The court applied to after refusal by a judge or other court was not exercising an appellate jurisdiction in entertaining the application. It was exercising a primary jurisdiction. It need not have heard of the former application, nor known of the materials on which it was founded; and, indeed, those before it might be different from the former. If indeed such a proceeding was an appeal that appeal exists still. Clearly where the first application is to a single judge, and where to the High Court, the Lord Chancellor could grant the writ refused by them on application to him, and vice versa. Whether if one division of the High Court, before the Queen's Bench, Common Pleas, and Exchequer Divisions were fused, had refused the writ, then another division would have been bound to entertain an application for one, I know not. If yes, then the Judicature Act left the matter as it was before. Anyhow there is the possibility of a second application now as of right, so that there is the less need for an express appeal to supply the want of being able to try more than one tribunal." G

LORD HERSCHELL says (*ibid.*, at p. 527): H

"It will be convenient, before proceeding to an examination of the section I

* Viz., an appeal to the Court of Appeal.

- A of the Judicature Act upon which this case turns, to state briefly the mode in which the courts have administered the law in relation to that writ. It was always open to an applicant for it, if defeated in one court, at once to renew his application to another. No court was bound by the view taken by any other, or felt itself obliged to follow the law laid down by it. Each court exercised its independent judgment upon the case, and determined
- B for itself whether the return to the writ established that the detention of the applicant was in accordance with the law. A person detained in custody might thus proceed from court to court until he obtained his liberty. And if he could succeed in convincing any one of the tribunals competent to issue the writ that he was entitled to be discharged, his right to his liberty could not afterwards be called in question."
- C LORD WATSON agreed with LORD BRAMWELL and LORD HERSCHELL, and LORD MACNAGHTEN agreed with LORD HERSCHELL. LORD FIELD, who dissented, says (15 App. Cas. at p. 543):
- "In support of this argument* it was correctly stated, as some of the noble and learned Lords who have addressed your Lordships have already pointed out, that at the time of the passing of the Act it was the undoubted right of a subject detained in custody to question by habeas the lawfulness of his detention before every one of Her Majesty's Courts in succession, without regard to the refusal to discharge by any one or more of them; and that if any one court came to the conclusion that the applicant was entitled to be discharged, no other court had any power of modification or reversal."
- E It is all the more noteworthy that their Lordships confined themselves in this way to the right of going from court to court having regard to their experience prior to the Supreme Court of Judicature Act, 1873. LORD BRAMWELL had been a baron of the Court of Exchequer from 1856, LORD ESHER had been a justice of the Court of Common Pleas since 1868 and LORD FIELD had been a justice of the Court of Queen's Bench.
- F Again, in *Secretary of State for Home Affairs v. O'Brien* (13) ([1923] A.C. 603 at p. 609) the EARL OF BIRKENHEAD says:
- "In the course of time certain rules and principles have been evolved; and many of these have been declared so frequently and by such high authority as to become elementary. Perhaps the most important for our present purpose is that which lays it down that if the writ is once directed to issue and discharge is ordered by a competent court, no appeal lies to any superior court. Correlative with this rule, and markedly indicative in itself of the spirit of our law, is that other which establishes that he who applies unsuccessfully for the issue of the writ may appeal from court to court until he reaches the highest tribunal in the land."
- H So far we venture to think that the authorities cannot be said to support the principle that except in vacation an applicant could go from judge to judge as opposed to going from court to court. Nor can we trace any single instance in the books of application being made to successive judges of the same court. The only real authority to the contrary appears to be *Eleko v. Nigeria Government* (3) ([1928] A.C. 459), to which we have already referred. Two considerations seemed to have influenced the Judicial Committee in that case: (1) That it would be curious if an applicant could by reason of the Act of 1679 renew his application before each judge in vacation whereas in term he could make it once to the Court of Chancery and once to each of the three Courts of Common Law. We have dealt with the historical evidence in its favour, but is this so curious? An applicant is entitled to the opinion of the full court. In vacation he cannot obtain that and so he was given the right to go from judge to judge. (2) That
- I

* Viz., that s. 19 of the Supreme Court of Judicature Act, 1873, did not give a right of appeal from an order discharging a prisoner under a writ of habeas corpus.

since by reason of the Supreme Court of Judicature Act, 1873, there is only one court, the Supreme Court of Judicature, an applicant by reason of that Act would only be able to make one application, namely, to the Supreme Court, unless he also had the right to go from judge to judge. A

This second reason brings us to an examination of the Judicature Acts, but before doing so we would mention that in *The State (Dowling) v. Kingston (No. 2)* (14) ([1937] I.R. 699), there is to be found a most illuminating judgment of FITZGIBBON, J. (with whom SULLIVAN, C.J., agreed) which considers *Eleko v. Nigeria Government* (3) in great detail and gives, we think, cogent reasons for thinking that LORD HAILSHAM, L.C., may have gone too far in that case. B

The Supreme Court of Judicature Act, 1873, by s. 3, united into one Supreme Court of Judicature the High Court of Chancery of England, the Court of Queen's Bench, the Court of Common Pleas at Westminster, the Court of Exchequer and other courts not relevant to the present matter. By s. 16 the jurisdiction of all these courts and the jurisdiction which at the commencement of the Act was vested in or capable of being exercised by all or any one or more of the judges of those courts sitting in court or chambers or elsewhere, was transferred to the High Court of Justice. There was thus transferred to the High Court of Justice any jurisdiction to issue writs of habeas corpus previously vested in the common law courts and in the individual judges of those courts. Section 23 provided that subject to the Act and rules made thereunder the transferred jurisdiction should be exercised as nearly as maybe in the same manner as it might have been exercised by the respective courts from which the jurisdiction had been transferred. Section 26 abolished the division of the legal year into terms, and gave the High Court power to sit at any time. Provisions for vacations and sittings in vacation were made by s. 27 and s. 28, but the new vacations unlike the old were not periods during which the common law courts were not in general able to function. Section 31 set up five divisions of the High Court, namely, Chancery, Queen's Bench, Common Pleas, Exchequer and Probate, Divorce and Admiralty; but s. 32 authorised the Queen in Council to order the reduction or increase in the number of divisions. It was under this power that the three common law divisions were combined into a single Queen's Bench Division by Order in Council in 1880. C D E F

Section 39 conferred on single judges of the High Court such jurisdiction as was previously exercisable by single judges of the former common law courts and such other jurisdiction of the High Court as might be directed or authorised to be so heard by rules of court, while s. 40 provided that such causes and matters as were not proper to be heard by a single judge should be heard by Divisional Courts. Further, by s. 41 it was provided as follows: G

"Subject to any rules of court, and in the meantime until such rules shall be made, all business belonging to the Queen's Bench, Common Pleas, and Exchequer Divisions respectively of the said High Court, which, according to the practice now existing in the superior courts of common law, would have been proper to be transacted or disposed of by the court sitting in banc, if this Act had not passed, may be transacted and disposed of by Divisional Courts, which shall, as far as may be found practicable and convenient, include one or more judge or judges attached to the particular division of the said court to which the cause or matter out of which such business arises has been assigned . . ." H I

At this stage therefore the position was that subject to any rules of court a single judge of the Queen's Bench Division sitting in court or chambers could exercise in relation to writs of habeas corpus any jurisdiction which could formerly have

A been exercised by a single judge of any of the three common law courts, while a Divisional Court of each of the three common law divisions could exercise the jurisdiction of the former Common Law courts sitting in banc. The effect of the Order in Council in 1880 was that the Queen's Bench Division became the successor of the three courts of Queen's Bench, Common Pleas and Exchequer sitting in banc, the only differences being that any two or more judges sitting as a

B Queen's Bench Divisional Court should constitute and be the court sitting in banc. That being so, we think that after 1880 an applicant for habeas corpus who had been heard by a Queen's Bench Divisional Court and refused, if he applied again to a Queen's Bench Divisional Court on the same evidence was in the same position as an applicant before 1873 who made a second application to the same

C Common Law court, and could be met with the objection with which the applicant was met in *Re Cobbett* (12) (5 L.T.O.S. at p. 130): "You have been heard once: we cannot enter into this matter again" [cf., p. 631, letter E, ante].

The Supreme Court of Judicature (Consolidation) Act, 1925, did not re-enact the express provisions of s. 41 of the Act of 1873 as to the powers of the former Common Law courts sitting in banc being exercisable only by Divisional Courts.

D Section 63, however, provided that Divisional Courts might be held for the transaction of any business in the High Court ordered by rules of court to be heard by a Divisional Court and that Divisional Courts for the purpose of the matters to be heard by them should exercise all or any part of the jurisdiction of the High Court which included all the jurisdiction formerly exercised by the

E three Common Law courts. Finally by R.S.C., Ord. 59, r. 1 and r. 14, the jurisdiction of the High Court in relation to habeas corpus was directed to be exercised either by a single judge or by a Divisional Court.

We do not think that this altered the position of a Queen's Bench Divisional Court when sitting to hear applications for habeas corpus. It still is the successor of the three Common Law courts sitting in banc, its decision is equivalent to the

F decision of all the judges of the division just as the decision of one of the old Common Law courts sitting in banc was the equivalent of the decision of all the judges of that court.

We know of no case since 1880 in which an application based on the same grounds and the same evidence has been renewed before a Divisional Court consisting of different judges of the Queen's Bench Division. Nor are there to be

G found any dicta in support of the making of such an application unless it be in *Ex p. Chapple* (4) (66 (pt. 2) T.L.R. 932), in which DENNING, L.J., said (ibid., at p. 936): "The only remedy of the subject is to go before another Divisional Court or another judge . . ." It may be that he was referring to a Divisional Court of another division, but if he meant a Divisional Court of the Queen's

H Bench Division consisting of different judges we think that he was wrong.

We hold, therefore, that the applicant having already once been heard by a Divisional Court of the Queen's Bench Division is not entitled to be heard again by another Divisional Court of the same division.

That is sufficient to dispose of the present case. Although it has been necessary for the purpose of ascertaining the nature of the jurisdiction exercised today by

I the Divisional Court in matters of habeas corpus to canvass the historical justification for the view expressed by the Judicial Committee in *Eleko v. Nigeria Government* (3), it is not necessary for the decision of the present application for us to express any concluded opinion as to the extent of an applicant's right today to go from judge to judge as distinct from going from Divisional Court to Divisional Court of the Queen's Bench Division. *Eleko v. Nigeria Government* (3) has remained unquestioned—except in the Irish case to which we have referred—for thirty years, and there are parallel decisions in Canadian and

Australian courts*. In a matter so important to the liberty of the subject we would not lightly disregard the principles there laid down and their correctness can be left for consideration until a case arises in which they are directly in point.

We would only repeat, in conclusion, what LORD GODDARD has so often said, that there should be an appeal to the House of Lords in criminal matters where the writ of habeas corpus has been refused. This case is just the case in which a ruling by the highest tribunal in the land is required.

Application dismissed.

[An order for costs in a nominal amount, e.g., £1, was sought by the respondent and was refused. No order was made as to costs.]

Solicitors: *Official Solicitor* (for the applicant); *Treasury Solicitor* (for the respondent).

[*Reported by WENDY SHOCKETT, Barrister-at-Law.*]

R. v. AYU.

[COURT OF CRIMINAL APPEAL (Lord Parker, C.J., Cassels and Diplock, JJ.), November 17, 1958.]

Criminal Law—Sentence—Incorrigible rogue—Nigerian offender—Offender sentenced to twelve months' imprisonment—Order binding offender over at end of imprisonment to return to Nigeria—Whether binding-over order valid—Justices of the Peace Act, 1361 (34 Edw. 3 c. 1).

An offender who was a native of Lagos was convicted by a magistrates' court of being found in a dwelling-house for an unlawful purpose contrary to s. 4 of the Vagrancy Act, 1824, and was committed to quarter sessions for sentence under s. 5 as an incorrigible rogue. The recorder sentenced him to twelve months' imprisonment and made an order that at the end of the period of imprisonment he should be bound over in his own recognisance in the sum of £10 to return to Nigeria and not to return to this country for five years thereafter, and that, in default of his entering into the recognisance, he would be imprisoned for six months. On appeal,

Held: the recorder had no jurisdiction to make the order for binding-over because (i) an order binding the offender to come up for judgment when called on could not be made in addition to the sentence of twelve months' imprisonment, and (ii) where a person was bound over to be of good behaviour under the Justices of the Peace Act, 1361, there was no power under that Act to impose a condition such as the condition for return to Nigeria.

R. v. McCartan (ante, p. 140) explained.

Appeal allowed.

[As to recognisances to keep the peace, being a binding-over order in lieu of or in addition to sentence, see 10 HALSBURY'S LAWS (3rd Edn.) 495, para. 904, and 25 HALSBURY'S LAWS (3rd Edn.) 233, para. 430; as to binding-over a person to be of good behaviour, by order made on complaint, see 25 HALSBURY'S LAWS (3rd Edn.) 232, para. 429.]

* See *Ex p. Byrne* ((1883), 22 N.B.R. 427 at pp. 436, 437); *Re Bowack* ((1892), 2 B.C.R. 216); *Ex p. Rowlands* ((1895), 16 N.S.W.L.R. 239); *R. v. Carter* ((1902), 5 Can. C.C. 401); *Re Baptist-Paul* (No. 2) ((1912), 7 D.L.R. 25); *R. v. Jackson* ((1914), 15 D.L.R. 545); *R. v. Gee-Dew* ((1924), 3 D.L.R. 153). These cases were referred to in argument in the case reported above. See also 16 DIGEST, title Crown Practice, at pp. 28, 29, of the supplement.

For a New Zealand decision supporting the principle that a decision of a Divisional Court of the Queen's Bench Division is a representative decision of the Queen's Bench judges, see *Ex p. Bowry* (No. 2) ((1900), 18 N.Z.L.R. 601 at p. 606).

- A As to the punishment of incorrigible rogues, see 10 HALSBURY'S LAWS (3rd Edn.) 702, para. 1342.

For the Justices of the Peace Act, 1361, see 14 HALSBURY'S STATUTES (2nd Edn.) 709.]

Cases referred to:

- B (1) *R. v. McCartan*, ante, p. 140.
(2) *R. v. Flaherty*, (June 23, 1958), "The Times", June 24.

Appeal.

- C The appellant, James Ayu, a native of Nigeria, was convicted at a magistrates' court at Brighton on Sept. 11, 1958, of being found in a dwelling-house for an unlawful purpose contrary to s. 4 of the Vagrancy Act, 1824, and was committed to quarter sessions for sentence as an incorrigible rogue. At Brighton Borough Sessions, on Sept. 22, 1958, he was sentenced to twelve months' imprisonment* and an order was made on Sept. 24, 1958, that at the end of such term of imprisonment as he might serve he should be bound over to return to Nigeria and that he should not return to this country for five years; in default of entering into such recognisance he should be imprisoned for six months.

- D On Oct. 24, 1958, the appellant moved the Divisional Court for an order of certiorari to have the order quashed. The proceedings were adjourned for him to appeal to the Court of Criminal Appeal against his sentence. The grounds of appeal were that the recorder had no jurisdiction to make the order, because (i) he had no jurisdiction at all to order the appellant to be bound over to be sent to Nigeria and not to return to this country for five years; (ii) alternatively, if the recorder had jurisdiction to make such matters to be the conditions of a recognisance, it could be only in respect of a recognisance to come up for judgment; and (a) an order to enter into a recognisance to come up for judgment could not be made in respect of an incorrigible rogue, or (b) such an order could only be made in lieu of, and not in addition to, any order imposing imprisonment.

- F *M. D. L. Worsley* for the appellant.
C. J. T. Pensotti for the Crown.

- G LORD PARKER, C.J., delivered the following judgment of the court: The appellant was convicted at a magistrates' court at Brighton of being found in a dwelling-house for an unlawful purpose and was committed to quarter sessions for sentence as an incorrigible rogue. At Brighton Borough Sessions he was sentenced by the recorder to twelve months' imprisonment and an order was made

- H "that at the end of any imprisonment which he may undergo or at such earlier date as the Home Secretary may direct he is bound over in his own recognisance in the sum of £10 to accompany an escort to the train, boat or aeroplane where he will be sent to Nigeria as soon as arrangements can be made and that he does not land again in this country for a period of five years thereafter. In default of his so entering into such recognisance he will be imprisoned for six months."

- I The appellant is apparently a native of Lagos. He came to this country in 1939 and had various jobs, but since 1948 he has done no regular work whatsoever. He has had some sixteen convictions, for most of which he has been given short sentences of imprisonment varying from one month to two years. He has already been found to be an incorrigible rogue, and in September, 1958, he was given twelve months' imprisonment. Quite clearly, if it is possible to make an order imposing a condition that he goes back to his country and stays there, so much the better, but the whole question is whether there is any power to make such an order. It seems clear that this is possible and, indeed, it has been done, in

* Under s. 10 of the Vagrancy Act, 1824, as amended by the Criminal Justice Act, 1948, s. 83 and Sch. 10, this was the maximum sentence.

the case of an order binding a man over to come up for judgment when called on. That is a bind-over to keep the peace and come up when called on, given in lieu of sentence. Such a condition has been imposed in one or two cases and approved by this court, but we know of no case where such a condition can be inserted in a binding-over order under the Justices of the Peace Act, 1361*. Indeed, when one comes to think of it, it would be rather startling if the jurisdiction which can be exercised by a single magistrate to bind over under that Act could be made on conditions of any sort. A B

The learned recorder here went into the matter with very great care, and he was minded, if he could, to make this order. As I understand it, he was anxious that the matter should come before this court to see whether it could be done. It may be that he was to some extent misled by *R. v. McCartan* (1) (ante, p. 140). That was a case which had been referred to the Court of Criminal Appeal under s. 19 (b) of the Criminal Appeal Act, 1907, by the Home Secretary. The real question there on which the advice of the court was sought was whether it was possible to make it a condition of a probation order that a man should leave the country and go in that case to Northern Ireland, and the court, in saying that they were clearly of opinion that no such condition could be made, did go on to say it could be made a condition of a binding-over. LORD GODDARD, C.J., D quoted (ante, at p. 142) the words which he had used in *R. v. Flaherty* (2) ((1958), "The Times", June 24), in these terms:

"I then called on the boy and said: 'The court is going to bind you over in your own recognisance in the sum of £10 that you accompany an escort to the train, where you will be sent to Eire tonight or as soon as arrangements can be made, and you must not land again in this country for at least three years.' "

On the face of that, it might be thought that a condition was being inserted in a binding-over under the Act, but when one looks at the record it is quite clear that the order made in that case was an order made after the sentence had been quashed providing that the offender was to come up when called on for judgment, and in effect by way of condition saying: "You will not be called up for judgment if you go to Eire and reside there for three years without coming back". That form of order, a binding-over to come up for judgment when called on, could not be made in this case in addition to the twelve months' imprisonment; and, there being no power to make that condition part of a binding-over under the Act† which the recorder could make as a magistrate, the order he made must be quashed leaving the sentence on this appellant as the sentence of twelve months' imprisonment. I should add that this case shows very clearly the need, which has already been canvassed, I understand, in other quarters, for there being power to deport a man such as this. F G

Appeal allowed.

Solicitor: Registrar, Court of Criminal Appeal (for the appellant); Town Clerk, Brighton (for the Crown).

[Reported by E. COCKBURN MILLAR, Barrister-at-Law.]

* This Act, so far as is relevant, provides power for justices "to take and arrest all those that they may find by indictment, or by suspicion, and to put them in prison; and to take of all them that be[not] of good fame, where they shall be found, sufficient surety and mainprise of their good behaviour towards the King and his people . . ." The jurisdiction for binding-over is that of taking surety for good behaviour; its origins were much considered in *Lansbury v. Riley*, [1914] 3 K.B. 229.

† The Justices of the Peace Act, 1361.

A HOUSDEN (INSPECTOR OF TAXES) v. MARSHALL.

[CHANCERY DIVISION (Harman, J.), November 18, 1958.]

Income Tax—Income—Isolated transaction—Newspaper articles—Taxpayer providing reminiscences and documents—Newspaper's "ghost" writer producing articles—Payment for services—Income Tax Act, 1952 (15 & 16 Geo. 6 & 1 Eliz. 2 c. 10), Sch. D, Case VI.

B The taxpayer, a well-known jockey, contracted with a newspaper company to make available to its nominee "reminiscences of his life and experiences on the turf for the purpose of writing a series of four articles", and to provide photographs, press cuttings, etc.; he also undertook to grant to the company "the first British serial rights in the said reminiscences" and he authorised the company "to publish the articles under his name". For the consideration so mentioned in the contract the company agreed to pay the taxpayer. He provided the information and documents and "vetted" the articles which were written by a "ghost" writer for the company. He was paid £750. He was charged to income tax on that sum.

C **Held:** the sum was assessable to tax under Case VI of Sch. D to the Income Tax Act, 1952, since it was a payment for services rendered, however trivial, and not a payment for property, since the taxpayer had no reminiscences in which he could sell the rights and no secrets to impart, but was merely allowing another to write from what he said and the product to be published under his name.

E *Trustees of Earl Haig v. Inland Revenue Comrs.* ((1939), 22 Tax Cas. 725) distinguished.

Hobbs v. Hussey ([1942] 1 All E.R. 445) applied.
Appeal allowed.

[As to casual profits of a revenue nature, see 20 HALSBURY'S LAWS (3rd Edn.) 288, para. 527; and for cases on the subject, see 28 DIGEST 81, 82, 451-462.]

F For Case VI of Sch. D to the Income Tax Act, 1952, see 31 HALSBURY'S STATUTES (2nd Edn.) 116.]

Cases referred to:

- (1) *Bradbury (Inspector of Taxes) v. Arnold*, (1957), 37 Tax Cas. 665.
- (2) *Hobbs v. Hussey*, [1942] 1 All E.R. 445; [1942] 1 K.B. 491; 111 L.J.K.B. 404; 167 L.T. 155; 24 Tax Cas. 153; 2nd Digest Supp.
- (3) *Haig (Earl) Trustees v. Inland Revenue Comrs.*, (1939), 22 Tax Cas. 725; 1939 S.C. 676; Digest Supp.

Case Stated.

H The taxpayer appealed to the Special Commissioners of Income Tax against an assessment to income tax in the sum of £750 made on him under Case VI of Sch. D to the Income Tax Act, 1952, for 1954-55. He had received the £750 from a company, Kemsley Newspapers, Ltd., under a written agreement made on Mar. 4, 1955, under which he made available to a writer appointed by the company reminiscences of his life and experiences on the turf and documents, photographs, newspaper cuttings, and other matter in his custody for the purpose of writing articles to be published under his name. He did not write anything but had the articles read over to him and suggested trifling amendments. He contended I that the agreement provided for the sale of the right to publish his reminiscences and that the £750 was not assessable under Case VI. The Crown contended that the agreement provided not for the sale of any property of the taxpayer, but for the performance of services by him, and that the £750 was properly assessable under Case VI. The Special Commissioners held that the agreement provided predominantly for the sale of the major part, if not the whole, of the publication rights in the taxpayer's reminiscences and any services to be rendered were subsidiary and incidental to the sale of his property in the reminiscences. They therefore discharged the assessment. The Crown appealed by way of Case Stated.

A. S. Orr for the Crown.

G. B. Graham for the taxpayer.

HARMAN, J.: Bryan Marshall, the respondent taxpayer, is a well-known jockey, particularly, I gather, riding under National Hunt rules. In 1955 he was approached by an emissary of a company, Kemsley Newspapers, Ltd., for what one may call his reminiscences. As a result, he entered into an agreement in writing with the company, dated Mar. 4, 1955, under which he has been paid a sum of £750. The Crown seeks to charge that sum to income tax as being annual profits or gains under Case VI of Sch. D to the Income Tax Act, 1952, and appeals against the rejection of that claim by the Special Commissioners. In my view, the case turns entirely on the construction of the written agreement of Mar. 4, 1955, and, though several cases relating to similar instances have been cited, I do not think that the construction of one agreement can be any guide to that of another, unless the two be exactly the same.

This kind of case arises as a result of something emanating either from the famous, e.g., Lord Haig, the soldier, and Steve Donoghue, the jockey, or from the infamous, e.g., William Cooper Hobbs (blackmail, forgery and arson). Either category can produce money, particularly from the Sunday newspapers, because the public likes to read at its ease before the fireside sensational reminiscences of either of these two categories of persons. Strictly speaking, they are not usually reminiscences of those persons at all; they are written by what are called "ghost" writers. The celebrated or notorious character communicates this or that to the "ghost" and, as here, may allow his signature to be used to give an air of reality to an otherwise bald and unconvincing narrative.

The issue here is agreed to be capable of a simple statement: Was the transaction the sale by the taxpayer of some property of his, or was he agreeing to perform services for the newspaper for a reward? That services come under Case VI of Sch. D has been recently re-stated by UPJOHN, J., in *Bradbury (Inspector of Taxes) v. Arnold* (1) ((1957), 37 Tax Cas. 665). He said (*ibid.*, at p. 669):

"There is no doubt that a contract for services may, and clearly does, form a matter for assessment under Case VI of Sch. D, and not the less so that the services to be rendered are trivial or that they are to be rendered once and for all so that the remuneration may be regarded as a casual profit arising out of a single and isolated transaction."

The distinction between sale of property and the performance of services is stated by LAWRENCE, J., in *Hobbs v. Hussey* (2) ([1942] 1 All E.R. 445 at p. 446), Hobbs in that case being the notorious individual to whom I previously referred.

The agreement, therefore, is the thing at which one must look. The first clause binds the taxpayer to make available to a nominee of the company

"reminiscences of his life and experiences on the turf for the purpose of writing a series of four articles."

There what he has got to provide is reminiscences. He also undertakes by cl. 3 to provide photographs, press cuttings, and such like, no doubt to illustrate the articles which the writer would produce. By cl. 4 he is expressed as beneficial owner to grant to the company

"the first British serial rights in the said reminiscences and authorises the company to publish the articles under his name."

He also agrees not to communicate like matter to other people for a time. By cl. 6:

"For the consideration herein mentioned the company agrees to pay to the grantor",
the taxpayer, in the upshot, £750.

- A In fact the "ghost" writer did a certain amount of research on his own account and he produced the articles more or less ready made. The taxpayer was called on to do very little of the things which he had undertaken to do. To use a vulgarism he merely had to "vet" the product of the "ghost" writer, who also provided the pictorial background to illustrate it. So that the taxpayer did not do very much, but he did as much as he was called on to do, and he was
- B paid the figure contracted for.

What was he paid for? He was paid for making available his reminiscences and for producing certain documents if called on, and, I think, for nothing else. It is true that by cl. 4 he is expressed to grant the British serial rights in the reminiscences. But no reminiscences were in existence when he so purported to grant the rights, and the reminiscences were never his copyright; they were

C the copyright either of the man who wrote them (i.e., the "ghost"), or of the "ghost's" employers. There was nothing for the taxpayer to grant. It is also true he authorised the use of his name and a facsimile of his signature. That was something in which he had a property.

After stating quite correctly what the point was, the Special Commissioners came to the conclusion that the agreement provided

- D "predominantly for the sale of the major part, if not the whole, of the publication rights in his reminiscences",
- and that services to be rendered were merely subsidiary. That is an inference which they have drawn from the wording of the document; it is a conclusion of law with which I cannot agree. I do not think that he sold any publication rights in his reminiscences. He had no reminiscences of which he could sell the rights.
- E The reminiscences which he communicated to the journalist were not his (if they had been used which in the upshot they were not); he had no secrets to impart, his life was open. He was not selling anything of which he had the property like the copyright. He was not selling anything secret. He was merely talking to the journalist and allowing the journalist's write-up to be put forward as his.

- F What, then, did he do in order to be paid £750? He performed some services, trivial enough in the upshot because the work was done for him, but the amount of service, UPJOHN, J., shows, is of no materiality. It is quite different from *Trustees of Earl Haig v. Inland Revenue Comrs.* (3) ((1939), 22 Tax Cas. 725), where the trustees of Earl Haig had his diaries in their possession, a subject of copyright. They sold a part of the rights of publication of those diaries, not the whole of them, for reasons which I need not go into. Not unnaturally LORD
- G NORMAND (Lord President) came to the conclusion that what they were selling was a piece of property and that the price was not taxable. On the other hand, in *Hobbs' case* (2), Hobbs did contract to write the articles and did in fact do so, so that he did a great deal more than the taxpayer here. It was none the less held that he was paid for the services he rendered and not for the articles he sold.

- H With all respect to the Special Commissioners, this seems to me a fairly plain case. I think, perhaps, they were misled by cl. 4 of the agreement, by which the taxpayer is expressed to grant something like a copyright or a part of a copyright. When one remembers there was no such thing for the taxpayer to grant, nor would there be such a thing, that clause does not carry any weight; and even though he did sell them something in which he had property, the right to use
- I his name, that was a subsidiary matter in my view, and the major object and effect of the agreement was that he was paid a sum of money for services rendered. That is a taxable subject-matter and I must allow the appeal.

Appeal allowed.

Solicitors: *Solicitor of Inland Revenue; Delmé, Radcliffe & Brunskill, Devizes* (for the taxpayer).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

Re CUTCLIFFE (*deceased*). LE DUC v. VENESS AND ANOTHER. A

[COURT OF APPEAL (Hodson, Morris and Ormerod, L.JJ.), November 6, 10, 11, 1958.]

Probate—Costs—Incidence—Undue influence alleged but not proved—Whether litigation due to fault of testator or of beneficiary establishing will—Whether costs payable out of estate.

The testator was an old man of eighty-four and was ill and needed looking after. He had lived in his own house for many years with his stepdaughter, who looked after him until June, 1954, when after one of their quarrels she left to go into an institution for the blind, her eyesight having nearly failed. In August, 1954, he made a will leaving his property to trustees for the daughter of a family living in a flat in the house, the trustees to grant the flat to the daughter's father and mother at a nominal rent. In January, 1955, he was visited by his stepdaughter and made a second will in her favour which was witnessed by two friends accompanying her on the visit. The same day he signed a document certifying that he had "not signed any document on [that] date which I wish to be classified as valid and in accordance with my wishes". He died in February, 1955. In an action by the stepdaughter propounding the second will, the father and daughter who were beneficiaries under the first will, as first and second defendants, sought to have the second will set aside on the ground, among other grounds, of undue influence by the stepdaughter. The first defendant's wife gave evidence that on the occasion of the stepdaughter's last visit to the testator she had heard the words "sign, sign, sign" shouted by the stepdaughter in a voice growing louder. The judge rejected the evidence of the first defendant's wife, found that there had been no undue influence on the part of the stepdaughter, pronounced in favour of the second will and made an order for costs against the defendants. On an appeal against the order for costs,

Held: the stepdaughter's costs should be paid by the defendants as ordered and not out of the estate, since the litigation had not been brought about by the fault of the testator or of the beneficiary, the stepdaughter, and an order for costs out of the estate could not be claimed by the defendants whose allegation of undue influence had been the main issue and had failed and whose evidence thereon had been rejected.

Dicta of SIR JAMES WILDE in *Mitchell & Mitchell v. Gard & Kingwell* ((1863), 3 Sw. & Tr. at pp. 276, 278) and principles stated in *Spiers v. English* ([1907] P. 122) approved.

Tyrrell v. Painton ([1894] P. 151) considered.

Per HODSON, L.J.: in the Probate Division, notwithstanding exceptions to be found in the books, the probability is that people who unsuccessfully make pleas of undue influence and of fraud will be condemned in the costs not only of that charge but of the whole action (see pp. 648, 649, post).

Appeal dismissed.

[As to costs payable out of the estate in probate actions, see 16 HALSBURY'S LAWS (3rd Edn.) 209, 210, paras. 374-377; and for cases on the subject, see 23 DIGEST (Repl.) 265-267, 3235-3247 and 270-275, 3280-3341.]

Cases referred to:

- (1) *Tyrrell v. Painton*, [1894] P. 151; 70 L.T. 453; 23 Digest (Repl.) 132, 1368.
- (2) *Barry v. Bullin*, (1838), 2 Moo. P.C.C. 480; 1 Curt. 637; 12 E.R. 1089; 23 Digest (Repl.) 131, 1357.
- (3) *Fulton v. Andrew*, (1875), L.R. 7 H.L. 448; 44 L.J.P. 17; 32 L.T. 209; 23 Digest (Repl.) 133, 1382.
- (4) *Brown v. Fisher*, (1890), 63 L.T. 465; 23 Digest (Repl.) 134, 1383.
- (5) *Mitchell & Mitchell v. Gard & Kingwell*, (1863), 3 Sw. & Tr. 275; 33 L.J.P.M. & A. 7; 9 L.T. 491; 28 J.P. 104; 164 E.R. 1280; 23 Digest (Repl.) 271, 3293.

- A (6) *Spiers v. English*, [1907] P. 122; 76 L.J.P. 28; 96 L.T. 582; 23 Digest (Repl.) 266, 3240.
- (7) *In the Estate of Plant, Wild v. Plant*, [1926] P. 139; sub nom. *Re Plant, Wild v. Plant*, 95 L.J.P. 87; 135 L.T. 238; 23 Digest (Repl.) 266, 3242.
- (8) *Orton v. Smith*, (1873), L.R. 3 P. & D. 23; 42 L.J.P. & M. 50; 28 L.T. 712; 37 J.P. 503; 23 Digest (Repl.) 273, 3312.

B Appeal.

The defendants in the action, Albert Edward Veness, and his daughter, Maureen Beatrice Elizabeth Veness, appealed against an order made by COLLINGWOOD, J., on May 21, 1958, whereby he pronounced for the force and validity of the will of the testator, Edmund Perrin Cutcliffe, dated Jan. 31, 1955, which was propounded on behalf of the plaintiff, the executrix named in the will. The defendants were ordered to pay the plaintiff's costs in the action. Before the hearing of the appeal the defendants gave notice to the plaintiff that they abandoned the appeal on the issue of liability and would limit the appeal solely to the question of costs. Their grounds of appeal on the question of costs were (i) that the judge failed to give due weight to the following matters: (a) that the litigation took its cause in the testator's fault and that the testator's conduct had reasonably excited doubt and suspicion; (b) that there were sufficient grounds to question the execution of the will, the righteousness of the transaction and whether the script dated Jan. 31, 1955, expressed the true will of the testator and whether he knew and approved of its contents; (c) that the conduct of the plaintiff and the circumstances in which the script was prepared and executed were the real causes of the litigation and were such as reasonably to excite doubt and suspicion; (d) that the facts fell within the principles laid down in *Tyrrell v. Painton* (1) ([1894] P. 151); *Barry v. Butlin* (2) ((1838), 2 Moo. P.C.C. 480); *Fulton v. Andrew* (3) ((1875), L.R. 7 H.L. 448); and *Brown v. Fisher* (4) ((1890), 63 L.T. 465); and that accordingly it was reasonable for the defendants to plead undue influence; and (e) that the judge's order was contrary to the rules theretofore acted on in the Chancery Division. The facts are stated at pp. 644, letter I, et seq., post.

C. L. Hawser for the defendants.

Victor Williams for the plaintiff.

HODSON, L.J.: This is an appeal from a judgment of COLLINGWOOD, J., given on May 21, 1958. Notice of appeal was given against the judgment, but has not been pursued except as to costs. The action was a probate action in which the plaintiff was Mrs. Le Duc, a widow, who was seeking to propound the will of a testator, Edmund Perrin Cutcliffe, dated Jan. 31, 1955. The defendants, Albert Edward Veness and Maureen Beatrice Elizabeth Veness, were father and daughter, and were interested under a will of an earlier date, Aug. 23, 1954, both as executors and as beneficiaries.

Leave to appeal was given by the learned judge but orders as to costs are made in the exercise of discretion and are not readily reviewed unless the court is satisfied that there has been a real error. As regards any rule of practice as to costs in probate actions, SIR JAMES WILDE said in *Mitchell & Mitchell v. Gard & Kingwell* (5) ((1863), 3 Sw. & Tr. 275 at p. 276):

I "These questions of costs are addressed to the discretion of the court. It is hardly in the nature of discretion that its exercise should be adjusted by exact rule. No positive regulation could be established that would bear the strain put upon it by the justice or hardship of particular instances. But, where all is not possible, something may yet be done. By acknowledged method and general classification, the suitor may in some measure be enabled to estimate the prospect before him, and foresee the penalties under which he launches into litigation. To this extent it is the duty of the court, so far as may be, to assist him."

It is important to bear those words in mind when dealing with authorities which purport to lay down general principles on the exercise of discretion as to costs in these cases. A

The headnote in *Spiers v. English* (6) ([1907] P. 122) sets out very clearly the principle on which the Probate Court exercises its discretion as to costs in these words:

"The two main principles which should guide the court in determining that costs in a probate suit are not to follow the event are, firstly, where the testator or those interested in the residue have been the cause of the litigation; and, secondly, if the circumstances lead reasonably to an investigation in regard to a propounded document. In this latter case the costs may be left to be borne by those who incurred them; in the former, the costs of unsuccessfully opposing probate may be ordered to be paid out of the estate. Neither of those principles, which, however, are not exhaustive, justifies a plea of undue influence unless there were reasonable grounds for putting it forward." B C

In that case the plaintiff, a nephew and one of the next of kin of Charlotte Spiers, alleged that a will of 1905 was not duly executed, that the deceased did not know and approve of the contents thereof and alleged that the purported execution of the will was obtained by the undue influence of the defendant. The jury found for the defendant on all the issues, and the court pronounced for the will. The plaintiff—and this is the point which is relevant—asked for costs out of the estate, or, alternatively, that the court should direct that each party should pay his own costs. The learned judge decided that the plaintiff had not shown any ground on which he ought to order that the plaintiff's costs should be paid out of the estate, and, therefore, would not interfere with the ordinary rule that the costs should follow the event. SIR GORELL BARNES, P., was there referring to the rule that the losing party pays as the ordinary rule. In reaching that conclusion, he stated the principles set out in the headnote and was affected by the fact that, although there was an onus on the defendant to show that the testatrix knew and approved of the contents of her will, the plea of undue influence ought never to have been put forward unless the party raising it had reasonable grounds on which to support it. In that situation he made the ordinary order that costs should follow the event, which is the order which the learned judge has made in this case. *Spiers v. English* (6) was cited in this court in *In the Estate of Plant, Wild v. Plant* (7) ([1926] P. 139), apparently with approval, and that statement of principle is a useful guide to judges who have to exercise their discretion in matters of costs in probate actions and is one which, so far as I know, has been consistently followed since 1907. D E F G

The case as put before this court was that the learned judge was in error in that he did not, at any rate in part, relieve the defendants from the burden of costs, because it is said that it was the fault of the testator that this litigation had been brought about; and, if not the fault of the testator, it was the fault of the beneficiary, namely, the plaintiff, the residuary legatee. If either of those qualities were to attach to this case, the judge would be expected to allow the defendants' costs out of the estate in accordance with the usual practice, at any rate so far as the issue of knowledge and approval was concerned, although it is admitted that it would be proper to penalise the defendants because they had put forward a plea of undue influence which had failed. H I

The testator, who was eighty-four, was living in a house, 9, Shirley Road, Bedford Park. With him in that house for many years had lived the plaintiff, Mrs. Le Duc, who was his stepdaughter, because he had married her mother in 1910. The mother died in 1941, and the plaintiff remained with the testator in the house looking after him continuously from 1941 to 1954. As from June, 1952, Mr. and Mrs. Veness, the first defendant and his wife, lived upstairs in a flat paying £3 a week rent. The testator was not only old, but also he was ill and wanted

- A looking after. According to the evidence, the plaintiff, his stepdaughter, was nearly blind, and she looked after the testator with no great pleasure on her part or even apparent gratitude on his part, and quarrels between the stepdaughter and the testator were often heard by the first defendant and his wife. In June, 1954, there was a quarrel between them which immediately preceded the plaintiff's leaving the house and going to hospital or to a home for the blind, because her
- B eyesight had very nearly failed. She has never been back since.

- The testator himself went into hospital on Dec. 20, 1954, came out on Jan. 11, 1955, and went in again a day or two before he died on Feb. 24, 1955. He made his first will in August, 1954, in favour of the first defendant and his daughter. For that purpose, he called in a solicitor, a Mr. Bull, who took instructions for the will and had a conversation with him about his relations and about his step-
- C daughter, the present plaintiff. On Aug. 23, 1954, that will was executed by the testator in the presence of Mr. Bull, who was one witness, and of a Dr. Winder, the other witness, who was called as a witness in the case. The effect of the will was to leave the property, consisting in the main of a leasehold house, to trustees for the second defendant, the daughter of Mr. Veness, the trustees to grant the first floor flat to the first defendant and his wife at a nominal rent. There
- D was some evidence that, while the deceased was in hospital for the first time between Dec. 20 and Jan. 11 (which evidence is recorded in the judgment), the plaintiff visited him there, and on one occasion the plaintiff was accompanied by a man, who asked the sister in the hospital if she was prepared to witness a will. There is no evidence as to what the contents of any document which may have been in existence at that time were. The sister did not give any evidence about it,
- E and nothing further is known of that.

The next event is recorded in the attendances of Mr. Bull on Jan. 19, 1955. He attended the testator at 9, Shirley Road. He had been sent for because the client was concerned about his affairs and wished to know if they were in order. The note says:

- F "His relations (not blood relations) had been pestering him in hospital and since he had been home. He said they were a lot of blasted scoundrels and he was determined that whatever they did they would get nothing from him. He asked me to tell him how he had left his affairs. He was perfectly coherent and understood what I said but his memory was not too good. I explained to him the will he had made on 23.8.1954 and that he had left everything to Mr. Veness's [the first defendant's] daughter. He smiled
- G and nodded and asked if he could rely on that because that was what he wanted and he was worried about what those relatives who had been pestering him of late had been doing. I told him not to worry and that his affairs were in order as he required. He asked if the relatives could have the will set aside because he seemed to think that he had been pressed to sign some paper by one of them recently."

- H Then one has to take in an additional paragraph which is a rider:

- "I asked him if he had at any time signed any paper which he believed to be another will. He did not remember doing so and felt very ill when in hospital but did recall being asked by one of the relatives—a nephew by marriage—to sign something but did not remember whether he did or not.
- I He then said: 'Blast them, they kept pestering me and they still come here and he (Mr. Veness [the first defendant]) let them see me'."

That is the end of the rider. Then, going back to the main document, it says:

"I replied that such paper if purporting to be a will would be invalid and that he could rely on my word that his affairs were in order as he desired."

After that interview with Mr. Bull, which undoubtedly took place on that date, the testator, whose health was not improving but who was of sound mind so far as the evidence and the allegations in the case go, on Jan. 31 saw the plaintiff

and Mrs. Eliza Cole and a Mrs. Bull who went to 9, Shirley Road, the testator's house, taking with them a will, which is in typewritten form and is as short as it could be, leaving in effect everything to the plaintiff. That was duly executed and signed by the testator and was witnessed by Mrs. Cole, who signs herself as "secretary", and Mrs. Bull, who is nothing to do with the Mr. Bull whom I have already mentioned. The evidence of these witnesses commended itself to the learned judge, who found that the deceased knew perfectly well what he was doing and fully understood its effect, and indeed had quite a long conversation over a period of about forty minutes.

A rather remarkable thing happened after that. On the same day the testator wrote out in his own handwriting, which is rather shaky but firmly signed, the following document:

"This is to certify that I Edmund Perrin Cutcliffe of number nine (9) Shirley Road, Chiswick, W.4 have not signed any document on the above date which I wish to be classified as valid and in accordance with my wishes."

The first defendant's wife gave evidence about a conversation that she had with the testator during that evening. I do not propose to read what the judge extracted from her evidence, because he expressly rejected it, certainly as to the condition of the testator, in these words:

"I have seen the two attesting witnesses and the first defendant and his wife in the witness-box, and I accept the evidence of the former. In my opinion the first defendant and his wife were not reliable witnesses as to the testator's condition or as to his state of stupor on that Monday evening [i.e., Jan. 31] and I am satisfied, having heard the denials of Mrs. Bull and Mrs. Cole, that this story of the plaintiff shouting 'sign, sign, sign' is a complete invention."

There is there a rejection of the first defendant's wife's evidence, to which I shall refer again, and there is also a rejection in the judgment of the first defendant's evidence as to what he did with the document which I have just read. The learned judge was not impressed by the evidence of the Venesses, including not only the wife, whose evidence he expressly rejected as an invention on one point, but also the husband, the first defendant. Anyway, the testator undoubtedly showed this document, the so-called certificate, to the first defendant, and it undoubtedly was in his handwriting and was signed by him, and, according to the first defendant, it was put in a box beside the bed. Eventually it came to the knowledge of Mr. Bull, if not into his possession, after the death of the testator.

I need not say anything about execution, which was only formally raised as an issue. But there was the issue of want of knowledge and that of undue influence. There was no direct evidence of undue influence except that of the first defendant's wife that she heard a crescendo of words "sign, sign, sign" while standing outside the door while, so it was alleged, the testator was being compelled to sign the will by the plaintiff, who, according to the evidence, had previously been frightened of him and not he of her. That evidence was expressly rejected by the learned judge, and, in my opinion, there was no other direct evidence of undue influence. There was evidence as to the weak condition of this man, who was eighty-four, who indeed died in February, 1955, so that he might be fairly described as then a dying man. But the evidence of the defendants' witnesses was undoubtedly regarded by the learned judge as being greatly exaggerated. From the passage in his judgment, *supra*, it appears that he did not accept their evidence, and the evidence of Dr. Winder, which the judge stated that he accepted, does not give such a sad picture of the physical condition of this man as the defendants had sought to give. The document of Jan. 31 and the conversation on Jan. 19 are not in themselves evidence of undue influence against the plaintiff; but, in my judgment, they are relevant in considering whether

- A the testator knew and approved of the contents of his will dated Jan. 31. In my opinion, they would come under the heading of circumstances which are likely to arouse suspicion in ascertaining facts relating to the execution of the will. The category of these circumstances is not closed as is shown by the judgment of the Privy Council in *Barry v. Butlin* (2) ((1838), 2 Moo. P.C.C. 480). So far as undue influence is concerned, not only did the defendants fail to establish their case,
- B which was based on the very minimum of direct evidence, but also the learned judge specifically rejected as untruthful the evidence of Mrs. Veness, the first defendant's wife, which was intended to be direct evidence on the issue of undue influence in the words "sign, sign, sign".

- On the other part of the case, the learned judge recognised that this was one of those cases where the suspicion of the court was aroused and that the situation
- C was parallel with that which existed in *Tyrrell v. Painton* (1) ([1894] P. 151). There the testatrix had made wills in favour of the defendant in 1880 and in 1884, but afterwards became dissatisfied with him and made complaints against him. On Nov. 7, 1892, she made a will leaving her property to the plaintiff. On Nov. 9, two days later, the son of the defendant brought the testatrix a will prepared by him, leaving her property to the defendant. The will was executed
- D by her in the presence of and attested by the son of the defendant and a young friend of his. The only evidence adduced by the defendant was that of the attesting witnesses, who were examined, and it was held on appeal that the evidence of the attesting witnesses was not sufficient to remove the suspicion arising from the circumstances under which the later will was prepared and executed and that the former will must be established. The rule in *Barry v. Butlin* (2) was applied by the Court of Appeal which reversed the decision of
- E the trial judge and found for the earlier will. DAVEY, L.J., said (*ibid.*, at p. 159):

- "It must not be supposed that the principle in *Barry v. Butlin* (2) is confined to cases where the person who prepares the will is the person who takes the benefit under it—that is one state of things which raises a suspicion; but the principle is, that wherever a will is prepared under circumstances which raise a well-grounded suspicion that it does not express the mind of the testator, the court ought not to pronounce in favour of it unless that suspicion is removed. Here the circumstances were most suspicious, and the question a judge has to ask himself is whether the defendants have discharged themselves of the onus of showing the righteousness of the transaction, and without going again over the circumstances which
- F have been referred to, I am compelled to say that they have not."
- G

- This case was fought in part on what I may call the *Tyrrell v. Painton* (1) lines and in part on the plea of undue influence. The learned judge not only rejected the plea of undue influence but found that the plaintiff, although she was not called as a witness, nor was her son called, had established the will of Jan. 31 as
- H being the will of the testator. The person who was supposed to have prepared the will was a solicitor's managing clerk, who was dead. There was no real evidence that he had prepared the will. Although the evidence was limited to the evidence of the attesting witnesses so far as the last will was concerned, the learned judge, having heard that evidence and disbelieving the evidence of the Venesses, the first defendant and his wife, expressed himself satisfied that the will of
- I Jan. 31 was the will of the testator. There is now no appeal against that decision. The only appeal is on the question of costs.

It is said that the learned judge erred in the way in which he approached the exercise of his discretion. In my opinion, there was no error at all. He considered all those matters which it was material for him to consider, and the transcript of his judgment shows that, followed as it is by argument of counsel and the observations of the learned judge on this topic.

So far as the first exception in *Spiers v. English* (6) is concerned, I do not think that it can be said that this litigation was brought about by the fault of the

testator. It has been argued that, because the testator gave a statement to Mr. Bull on Jan. 19 and left behind him this rather remarkable document of Jan. 31, he was himself responsible for inviting litigation about his estate. I cannot subscribe to that view. While it would not be possible to limit the circumstances in which a testator is said to have promoted litigation by leaving his own affairs in confusion, I cannot think it should extend to cases where a testator has misled other people by his words, either written or spoken, and perhaps inspired false hopes in their bosoms that they may benefit after his death. It does not seem to me that such a situation was in the minds of the learned judges who in the past laid down the practice that costs should be allowed out of the estate, where the fault of the testator has led to the litigation. The common situation is that which arises day by day in the courts, of construction where the testator has used language which is difficult to understand, and where by himself or by his solicitor he has created the difficulty. There the costs are normally borne by the estate. That rule applies particularly in probate actions where, e.g., execution is on the face of it doubtful and where, as in *Orton v. Smith* (8) ((1873), L.R. 3 P. & D. 23), the testator had patched up his signature in such a way as to make a handwriting expert who gave evidence to that effect suggest that the signature was a forgery and not the signature of the testator at all. I do not think that there is any question here of the litigation being brought about by the fault of the testator.

Similarly, I do not think that any fault is to be attributed to the residuary legatee, the plaintiff, as being a cause of this litigation. I cannot see that anything can be attributed to her in the way in which this case developed. Certainly no evidence against her of undue influence was accepted by the learned judge. In the absence of any case of undue influence made out against her, or of some reasonable ground for making such a case, I do not here find anything in the learned judge's findings as to her conduct which would make it right to say that this litigation was her fault. I think that the way in which the learned judge approached the matter was clear from his concluding words, with which I find myself in complete agreement. When he had been addressed on the question of costs by counsel, he showed first that he was in sympathy with the application made by counsel for the defendants, because he remarked:

"There is a lot to be said for the proposition that it is the testator who is responsible for this litigation."

It was only afterwards, when counsel for the plaintiff had for the second time referred him back to his findings and to the fact that the witnesses who had been called to support a plea of undue influence had been disbelieved, that the learned judge came down in favour of the order which he made. He said this with regard to the plea of undue influence:

"It is a plea which should not be put forward without very strong grounds—reasonable grounds at the very least and here, as I have already indicated, it has been supported in the last resort by evidence which I cannot possibly accept—unfounded evidence. Yes, I must say costs must be paid by the defendants."

It seems to me a strong thing, and a thing to which I should be slow to listen, to maintain that people whose evidence has been found by the learned judge to have been wholly false and who have lost their case with costs against them, should be heard to say that an order for costs should be made wholly or in part in their favour because the court normally exercises its discretion in these cases along certain lines and in accordance with certain principles. The discretion of the court is always there, and the rules on which that discretion is exercised are for the assistance of those who have to advise litigants before they embark on litigation, so that they may have some idea of what risks they run as to costs. In the Probate Division, notwithstanding exceptions to be found in the books, the probability is that people who unsuccessfully make pleas of undue influence

A and of fraud will be condemned in the costs not only of that charge but of the whole action.

The evidence in this case was the evidence of the Venesses, the first defendant and his wife, and it was directed not only to the question of want of knowledge and approval but also to the question of undue influence. A great deal of evidence was directed to both those matters. It was not one of those cases where the defendants merely put the plaintiff to proof that the testator knew and approved of the contents of the will. They took on themselves the task of proving, if they could, that not only was that onus not discharged, but the will itself was brought into existence by the undue influence of the plaintiff. That they wholly failed to do. Having failed, and having failed because they were disbelieved, it seems to me almost inevitable that an order for costs would be made against them. I think that the order was rightly made and that this appeal should be dismissed.

MORRIS, L.J.: Notwithstanding the powerful submissions of counsel for the defendants, I have come to the same conclusion. Costs are always in the discretion of the court; but, without restricting or in any way making rigid the exercise of that discretion, the courts have given general guidance which will enable those embarking on litigation to know how in particular cases the discretion is likely to be exercised. In *Mitchell & Mitchell v. Gard & Kingwell* (5) (1863), 3 Sw. & Tr. 275 there is this passage in the judgment (*ibid.*, at p. 278):

“From these considerations, the court deduces the two following rules for its future guidance: first, if the cause of litigation takes its origin in the fault of the testator or those interested in the residue, the costs may properly be paid out of the estate; secondly, if there be sufficient and reasonable ground, looking to the knowledge and means of knowledge of the opposing party, to question either the execution of the will or the capacity of the testator, or to put forward a charge of undue influence or fraud, the losing party may properly be relieved from the costs of his successful opponent.”

F In *Spiers v. English* (6) ([1907] P. 122), SIR GORELL BARNES, P., used words much to the same effect. He said (*ibid.*, at p. 123):

“One of those principles is that if a person who makes a will or persons who are interested in the residue have been really the cause of the litigation a case is made out for costs to come out of the estate. Another principle is that, if the circumstances lead reasonably to an investigation of the matter, then the costs may be left to be borne by those who have incurred them.”

In the present case, quite independently of the issue of undue influence, there were these questions: First, was the testator in any way responsible for the litigation? Was there fault in the testator? Secondly: was this a situation within the principle in *Tyrrell v. Painton* (1) ([1894] P. 151)? As to the latter, the learned judge answered “Yes”. He thought that it was within the principle indicated by *Tyrrell v. Painton* (1).

On the view that he formed, the learned judge did not have to come to a final conclusion on the question whether the testator was responsible for the litigation. But he clearly had in mind the matters which counsel for the defendants put before him. For example, he referred specifically to the evidence as to what had been said to the doctor. He also referred to the evidence of Mr. Bull and to the document that came into existence after the second will was signed. The learned judge said that there was a lot to be said for the proposition that it was the testator who was responsible. But he did not proceed to decide that matter. I think that that was for this reason. It was put to the learned judge that the case had been fought substantially on the evidence of the Venesses, the first defendant and his wife, and that their evidence went very considerably to the issue of undue influence. That issue failed completely and it failed because the learned

judge rejected their evidence and, indeed, called it unfounded evidence. Therefore, it seems to me that the learned judge took the view that, substantially, the case was fought on the evidence of those witnesses and on the issue of undue influence and that the evidence of the Venesses had on many vital matters been positively rejected. I think that the learned judge, having that in mind and not forgetting the other considerations that had been put to him, came to the conclusion that the right order in the exercise of his discretion was that the costs should be paid by the defendants. I do not feel that I can say that the learned judge erred in coming to that conclusion. A
B

ORMEROD, L.J.: I agree and I have nothing to add.

Appeal dismissed.

Solicitors: *Manches & Co.* (for the defendants); *Francis Taylor & Fryzer* (for the plaintiff). C

[Reported by F. A. AMIES, ESQ., Barrister-at-Law.]

GRAHAM v. C. E. HEINKE & CO., LTD.

[COURT OF APPEAL (Lord Somervell, Morris and Pearce, L.JJ.), November 21, 26, 1958]. D

Costs—Payment into court—Several causes of action—Negligence or breach of statutory duty—Claim for damages for personal injuries—Notice of payment in not specifying whether payment in respect of common law negligence or breach of statutory duty—Damages awarded less than sum paid in—Costs—R.S.C., Ord. 22, r. 1 (2). E

The requirement of R.S.C., Ord. 22, r. 1 (2), that a notice of payment into court in satisfaction of several causes of action should specify what sum is paid in respect of each cause of action is directed to cases where the relief claimed is cumulative, not to cases where the two causes of action are alternative methods of claiming the same relief. F

Decision of DONOVAN, J., on this point ([1958] 1 All E.R. 365) approved.

[As to costs after payment into court, see 26 HALSBURY'S LAWS (2nd Edn.) 99, para. 187; and for cases on the subject, see DIGEST (Practice) 874-876, 4156-4163.] G

Appeal.

The plaintiff appealed against those parts of the judgment of DONOVAN, J., given on Jan. 17, 1958, which (i) quantified the damages awarded to him for the defendants' negligence and breach of their statutory duty at £760, (ii) ordered him to pay the defendants the costs of the action after the date of payment into court by the defendants of £1,000, and (iii) ordered that any balance of such costs over the plaintiff's costs down to the date of payment in be paid to the defendants out of the £1,000 in court. The Court of Appeal allowed the appeal on the first point and increased the damages to £1,160: as this was more than the sum paid in the other two points (DONOVAN, J.'s decision on which was reported, [1958] 1 All E.R. 365) did not arise, but the Court of Appeal expressed their opinion on the second point, on which the plaintiff had contended that the defendants should not be awarded any costs as their notice of payment in of the £1,000 merely stated that this sum was "enough to satisfy the plaintiff's claim", and did not specify what sum was paid in respect of common law negligence and what sum in respect of breach of statutory duty. The plaintiff contended that the notice therefore failed to comply with the requirements of R.S.C., Ord. 22, r. 1 (2)*. The case is reported only on this point. H
I

* The terms of this rule are printed at p. 651, letter C, post.

A *F. W. Beney, Q.C.*, and *Leonard Halpern* for the plaintiff.
Stephen Chapman, Q.C., and *J. D. Stocker* for the defendants.

LORD SOMERVELL, after stating the facts and his conclusion that the damages awarded should be increased to £1,160, continued:

B Secondly, a preliminary point was taken on R.S.C. Ord. 22, r. 1, which provides:

C “*Payment into court.* 1. (1) In any action for a debt or damages or in an Admiralty action the defendant may at any time after appearance upon notice to the plaintiff pay into court a sum of money in satisfaction of the claim or (where several causes of action are joined in one action) in satisfaction of one or more of the causes of action; provided that with a defence setting up tender before action the sum of money alleged to have been tendered must be brought into court.

“(2) Where the money is paid into court in satisfaction of one or more of several causes of action the notice shall specify the cause or causes of action in respect of which payment is made and the sum paid in respect of each such cause of action unless the court or a judge otherwise order.”

D On the conclusion to which I have come on the first point as to quantum, this point does not arise because the amount would then be in excess of the amount paid into court; but counsel on each side asked us, if we came to a conclusion on the point, to express it; and although normally it is desirable not to decide matters which one does not have to decide, it is right to express the view which I and my brethren hold on this point, which may often arise.

E The claim here was a claim, as so often arises in these cases, for negligence, or alternatively for breach of statutory duty; and the point taken was that as the payment into court did not specify the cause or causes of action in respect of which the payment was made, therefore it was a bad payment in, and that leave ought to have been obtained from a court or a judge. One sees, of course, how the point arises on the wording of the rule; but any rule, or indeed any

F document, falls to be construed in the light of its purpose to be gathered from its terms. The purpose of this rule is to avoid embarrassment, in the technical sense, when damages are claimed under two or more independent causes of action in cases where the relief claimed is cumulative. A man is claiming under cause A and cause B, and if he wins on both, he gets X plus Y in damages. If a sum of money is paid into court, it is difficult for him to know what to do
 G if he does not know how much is allocated to cause A and how much to cause B. If £250 is allocated to cause A, he may say: “That is all I hope to get under that, so I will take that sum out, and that will be the end of that”. The case will then proceed on cause B. That obviously is the problem with which the rule is intended to deal. In cases such as the present, however, where the relief claimed is not cumulative, and where the two causes of action are alternative
 H methods of claiming the same relief, the embarrassment which the rule is designed to prevent cannot arise, and, moreover, it would be impossible to comply with the rule by allocating part of the sum paid in to one, and part to the other, of the two alternative causes of action. Therefore, the learned judge was right in deciding that there had been no breach of the rule.

I MORRIS, L.J.: I entirely agree.

PEARCE, L.J.: I agree.

Appeal on quantum of damages allowed: judgment varied by increasing damages to £1,160.

Solicitors: *King-Hamilton & Green* (for the plaintiff); *Kingsbury & Turner* (for the defendants).

[Reported by HENRY SUMMERFIELD, Esq., Barrister-at-Law.]

BEWLAY (TOBACCONISTS), LTD. v. BRITISH BATA SHOE CO., LTD.

[COURT OF APPEAL (Lord Evershed, M.R., Sellers, L.J., and Roxburgh, J.), November 20, 21, 1958.]

Landlord and Tenant—New tenancy—Business premises—Opposition by landlord—Intention to demolish and reconstruct substantial part of premises—Proposed work including alteration to shop-front involving considerable changes in physical character of holding—Totality of proposed work to be considered—Landlord and Tenant Act, 1954 (2 & 3 Eliz. 2 c. 56), s. 30 (1) (f).

The tenants of a self-contained shop on the ground floor of No. 14, N. Street, applied for a new tenancy under Part 2 of the Landlord and Tenant Act, 1954. The landlords, who also owned the adjacent premises, No. 12, N. Street, and occupied No. 12, objected to the grant of a new tenancy on the ground that they intended to carry out substantial reconstruction on both No. 12 and No. 14 and could not reasonably do so without obtaining possession of No. 14. The proposed work involved, among other things, (a) the removal of the greater part of the dividing wall between No. 12 and No. 14 and its replacement by screens; (b) the reconstruction of an entirely new shop-front, with the abolition of any entrance to No. 14 from the highway; and (c) alterations to the lavatory accommodation at No. 14 and to the wall between No. 14 and No. 16, N. Street. The total estimated cost of the proposed work was about £5,600, the estimated cost of the alteration to the front of the premises being nearly £3,000. The work (and, in particular, the alterations to the shop-front) could not be done while the tenants remained in occupation under their tenancy. The county court judge found that the intended work, bearing in mind (a) and (b) above, involved both the demolition and the reconstruction of a substantial part of the premises, within the meaning of s. 30 (1) (f)* of the Act of 1954. He, therefore, refused to grant a new tenancy. On appeal the tenant argued that the work of demolition on the one hand and the work of reconstruction on the other hand should be considered separately, and if neither was substantial when considered in isolation the landlords were not within s. 30 (1) (f).

Held: in determining whether the requirements of para. (f) of s. 30 (1) of the Act of 1954 were fulfilled, the county court judge was entitled to look at the totality of the work proposed to be done, and to ask himself, as a question of fact, whether the proposals involved the demolition or reconstruction of a substantial part of the premises or the carrying out of substantial work of reconstruction thereon; there was evidence to support his finding and his decision should stand.

Observations by SELLERS, L.J., on alterations to a shop-front (p. 656, letters B and C, post).

Appeal dismissed.

[As to the proposed demolition or reconstruction of premises comprised in a holding, see 23 HALSBURY'S LAWS (3rd Edn.) 893, para. 1717; and for cases on the subject, see 3rd DIGEST SUPPLEMENT, title Landlord and Tenant, 7417p-7417pg.

For the Landlord and Tenant Act, 1954, s. 30 (1) (f), see 34 HALSBURY'S STATUTES (2nd Edn.) 414.]

Cases referred to:

(1) *Atkinson v. Bettison*, [1955] 3 All E.R. 340; 3rd Digest Supp.

(2) *Fisher v. Taylors Furnishing Stores, Ltd.*, [1956] 2 All E.R. 78; [1956] 2 Q.B. 78; 3rd Digest Supp.

* The terms of s. 30 (1) (f) are printed at p. 653, letter F, post.

A Appeal.

This was an appeal by the tenants, Bewlay (Tobacconists), Ltd., from an order made by His Honour JUDGE BASSETT at Ilford County Court on Mar. 26, 1958, dismissing their application for a new tenancy of business premises under Part 2 of the Landlord and Tenant Act, 1954. The premises, which comprised the ground floor of 14, North Street, Romford, Essex, were used by the tenants as a tobacconists' shop. The respondent landlords, British Bata Shoe Co., Ltd., were the owners and occupiers of the adjoining premises, 12, North Street, and they objected to the grant of the new tenancy on the ground that on the determination of the tenants' current tenancy they intended to carry out substantial reconstruction in both No. 12 and No. 14, North Street, and could not reasonably do so without obtaining possession of No. 14. The county court judge held that the requirements of s. 30 (1) (f) of the Act of 1954 were satisfied because the intended work involved both the demolition and the reconstruction of a substantial part of the premises comprised in the tenants' holding (the ground floor of No. 14) and the landlords could not reasonably do the work without obtaining possession of the holding. He stated that he regarded the premises as a whole remembering that the premises to be considered were those comprising the ground floor of No. 14, North Street, and that he had ignored the fact that the contemplated alterations would change the identity of No. 14 from self-contained premises into part of larger and different premises.

J. P. Widgery, Q.C., and A. P. Fletcher for the tenants.

A. H. Head for the landlords.

E LORD EVERSHERD, M.R.: This is an appeal by the tenants in proceedings under the Landlord and Tenant Act, 1954, whereby the tenants applied for the grant of a new tenancy of certain premises at No. 14, North Street, Romford, Essex. The point to be determined in the appeal is the single point whether the work which the landlords have admittedly proved that they intend to do on the termination of the tenancy is of a kind covered by the language of para. (f) of s. 30 (1) of the Landlord and Tenant Act, 1954, namely,

“that on the termination of the current tenancy the landlord intends to demolish or reconstruct the premises comprised in the holding or a substantial part of those premises or to carry out substantial work of construction on the holding or part thereof and that he could not reasonably do so without obtaining possession of the holding.”

The learned judge held that the work fell within the terms of the paragraph. We are asked to say that that decision was wrong, and so to say on the ground that, in answering the question, the learned judge misinterpreted the words of the paragraph. That much, indeed, has necessarily to be said: for the question whether the work proposed is or involves demolition or reconstruction of a substantial part of the premises, or substantial work of construction on part of the premises, is *prima facie* a question of degree and fact, and, therefore, in the present case at any rate, one which, in the absence of misdirection or of evidence to support the conclusion, this court will not review. So much is clear, as a matter of general principle, in an appeal coming from a county court —except, of course, in those cases (of which the present is not one) where appeal may now be made on questions of fact. It has also been laid down for us by the decided cases in this court, including particularly *Atkinson v. Bettison* (1) ([1955] 3 All E.R. 340).

The contemplated work is described by the learned judge in his judgment as follows:

“The contemplated work involves alterations to the lavatory accommodation which involves a small amount of demolition and reconstruction but

which in itself could in no sense be termed substantial. The wall between No. 14 and No. 16 is to be altered by filling in the recessed portion to make the surface wholly even, but again I should hesitate to call this by itself substantial and attach no real importance to it. The front is to be reconstructed by means of an entirely new shop-front and the present means of access to the premises from the street abolished. Although a shop-front is often put in by a tenant to suit his own requirements, it is certainly part of the structure of the building and the alteration shown in the specification and plans involves an alteration in the structure of the front of the whole premises and is a matter of reconstruction. On the fourth side of the premises lies the dividing wall between No. 12 and No. 14. The intention of the landlords is to remove approximately three quarters of this wall involving consequential alterations to some of the pillars supporting the ceiling. At some time or other the occupants of the premises on the first floor had desired a clear space above and this wall is not load-bearing. It was strongly urged by [counsel for the tenants] that, as the wall was not load-bearing, its removal either in whole or in part could not be classed as substantial."

Reference is made by the learned judge to the plans; and they are of interest as showing particularly that at present the shop No. 14 (occupied by the tenants) is a self-contained shop, with a shop window abutting on the pavement of North Street, but having an entrance set back at an angle from the pavement. The proposed alterations involve considerable (and I use that word deliberately) changes in the physical character of the front of the holding. If they are carried out as proposed, there will then be no access or entrance whatever from the highway, and there will be a wholly different front to the shop, the new front being substituted so as to cover the whole area of the ground that faces the street and is occupied by the tenants' holding. This is not a case, by any means, of mere substitution on the same site of a shop-front in the sense of a display window for another shop-front of a similar purpose and content. Certain it is that the proposed alterations to the shop-front could not possibly (so far as I can see) be done while the present tenants remained in occupation under their tenancy.

The learned judge expressed his final conclusion, in the paragraph on which counsel for the tenants has mainly directed his criticisms, as follows:

"Regarding then the matter solely from the point of view of the structure of the premises*, I take the view, bearing in mind particularly the alterations to the shop-front and the dividing wall between No. 14 and No. 12, that the intended work involves both the demolition and the reconstruction of a substantial part of the premises."

That conclusion is attacked by counsel for the tenants as necessarily involving a failure on the judge's part properly to analyse the requirements of the paragraph. As expanded, counsel's argument was to this effect: If work is to be done which involves some demolition and also some construction or reconstruction, and if the demolition, taken in isolation, is not demolition of a substantial part of the premises, and, similarly, if the work of construction or reconstruction does not involve construction or reconstruction on or of a substantial part of the premises, then the landlord cannot successfully invoke the paragraph by saying that the parts which are the subject of the demolition, on the one hand, and the construction or reconstruction, on the other, when added together, amount to

* The premises to which the county court judge was referring were the ground floor only of No. 14, North Street.

A a substantial part of the premises. This (says counsel) is what the judge has done, and that is the vice of his judgment. Moreover, it is inherent in that argument, first, that, if the removal of part of the wall between No. 14 and No. 12 can be said to be "demolition", then the substitution for it of the light screens proposed certainly cannot be said to be "reconstruction"; and, secondly, that the work in front of the shop which I have earlier described amounts to no more than a mere change of shop-front, which of itself (and counsel invoked some language of DENNING, L.J., in *Fisher v. Taylors Furnishing Stores, Ltd.* (2), [1956] 2 All E.R. 78 at p. 80) cannot be said to be work of substantial construction or of reconstruction of a substantial part of the premises.

I do not, for my part, accept either of these propositions: that is, I do not accept, first, that the removal of the wall is not "demolition", and, further, that the replacement of the wall by screens cannot fairly be called, in some real sense, "reconstruction", within the language of para. (f); and, secondly, that the change of the front of the shop can be (in effect) disregarded. As to the latter, I note further that the cost of this work to the front of the premises, together with the cost of remaking (to use a neutral word) the shop-front of No. 12, according to the estimate, amounts to nearly £3,000, out of a total proposed to be expended of about £5,600. If I am right, then the basis of the criticism of the judgment by counsel for the tenants goes. I think that the learned judge was entitled to look at the totality of what is proposed to be done and, as a matter of fact and common sense, to ask himself the question whether these proposals involved the demolition or reconstruction of a substantial part of the premises, or the carrying out of substantial work of construction on them. The case may perhaps be near the line, though I am not saying that it is. If, however, it is near the line, then I think that there was here evidence to justify the conclusion of fact which the judge expressed in the paragraph already quoted. I would add that I do not, for my part, accept the view that para. (f) is exclusively applicable to the kind of demolition, construction or reconstruction which is appropriate to turning to modern uses an old or out-of-date building. The paragraph does not say so, and we must construe the paragraph according to its terms.

Counsel for the tenants will not, I hope, think that I am unappreciative of his clear argument if I do not elaborate my judgment. I prefer to avoid exegeses of the statutory language unless they are absolutely necessary; for the result would otherwise tend thereafter to substitute for the problem of construction of parliamentary language the problem of the construction of the judgments of the court. I prefer, therefore, to express no view on what the answer would be in a case where the work proposed involved demolition of some part of the premises, with nothing whatever in the way of reconstruction of that part, and where the part so demolished could not be regarded as substantial—whether it would be legitimate then to add that part to some other part of the premises which was the subject of constructional work, and which in turn was not itself substantial. What I do say is that one is entitled in this case to look at the totality of the work to be done and ask oneself if that work, within the language of para. (f), involves a demolition or reconstruction of a substantial part of the premises or the carrying out of substantial work of construction on those premises or some part thereof. Applying what I think to be legitimate tests, and in the light of what I have already said in answer to the main argument of counsel for the tenants, I think that there was clearly evidence to support a conclusion favourable to the landlords. That being so, I think that there are no grounds on which we could interfere; and this appeal must be dismissed accordingly.

SELLERS, L.J.: I agree. The learned county court judge found that the intended work could not reasonably be done by the landlords without obtaining possession of the premises No. 14. The only question that remains on this appeal is, then, whether it was properly established that the landlords intended to demolish or reconstruct a substantial part of those premises. In my view, there was ample evidence on which the learned judge could arrive at that conclusion and there was no misdirection. I do not repeat the reasons which my Lord has given in that respect. A
B

I would only add one word about a shop-front. It seems to me that the construction of a shop-front might be expensive and elaborate and substantial in relation to the whole of the premises, but that normally the work of putting in such a front would not fall within para. (f) of s. 30 (1) of the Landlord and Tenant Act, 1954, because it has to be established that it could not reasonably be done without obtaining possession of the holding. It is within observation that very elaborate and large shop-fronts are frequently put in while the business is still continuing, justifying a notice "Business as usual". I would dismiss this appeal. C
D

ROXBURGH, J.: I agree.

Appeal dismissed.

Solicitors: *Bartlett & Gluckstein* (for the tenants); *Hatten, Asplin, Jewers & Glenney*, Grays Thurrock (for the landlords).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

A

R. v. MACKINNON AND OTHERS.

[CENTRAL CRIMINAL COURT (Salmon, J., and a jury), September 22, 1958.]

Criminal Law—Inducement to invest money—“Reckless” making of any statement, promise or forecast—Meaning of “reckless”—No offence independent of fraud—Prevention of Fraud (Investments) Act, 1939 (2 & 3 Geo. 6 c. 16), s. 12 (1).

B

The defendant, M., was charged jointly with others under the Prevention of Fraud (Investments) Act, 1939, s. 12 (1), with inducing persons to enter into contracts to acquire shares by making reckless statements and forecasts. It was submitted in his defence that he could not be found guilty of any offence under the section unless it was proved that he did not honestly believe that the statements and forecasts were true, because the word “reckless” implied that he had been dishonest in putting them forward.

C

Held: in s. 12 (1) of the Prevention of Fraud (Investments) Act, 1939, the reckless making of a statement or forecast meant a statement or forecast made by a person who did not care whether it was true or false, that is, a dishonest or fraudulent statement as distinct from one which was made with an honest belief in its truth, because, s. 12 (1) being a penal provision in an Act directed to the prevention of fraud, it would be wrong to approach its construction on the basis that the word “reckless” had a wider meaning than that attributed to it by the majority in *Derry v. Peek* ((1889), 14 App. Cas. 337).

D

R. v. Bates ([1952] 2 All E.R. 842) not followed.

E

[**Editorial Note.** VISCOUNT CALDECOTE, C.J., applied similarly a like construction of the word “recklessly” when construing it in the context of an offence created by a rationing order under defence regulations, where also there was no definition of the word; see *Williams Brothers Direct Supply Stores, Ltd. v. Cloote* ((1944), 60 T.L.R. 271, 272).

F

The Prevention of Fraud (Investments) Act, 1939, s. 12, was replaced, as from Oct. 23, 1958, by s. 13 of the Prevention of Fraud (Investments) Act, 1958, to which the present decision seems applicable.

For the Prevention of Fraud (Investments) Act, 1939, s. 12 (1), see 16 HALSBURY'S STATUTES (2nd Edn.) 525.]

Cases referred to:

G

- (1) *R. v. Bates*, [1952] 2 All E.R. 842; 36 Cr. App. Rep. 175; 3rd Digest Supp.
- (2) *Derry v. Peek*, (1889), 14 App. Cas. 337; 58 L.J.Ch. 864; 61 L.T. 265; 54 J.P. 148; 9 Digest (Repl.) 127, 685.
- (3) *R. v. Kysant* (Lord), [1931] All E.R. Rep. 179; [1932] 1 K.B. 442; 101 L.J.K.B. 97; 146 L.T. 21; 23 Cr. App. Rep. 83; 15 Digest (Repl.) 1115, 11,075.

H

Trial on Indictment.

The first defendant, Frank Hay Livingstone MacKinnon, was charged jointly with other defendants on four counts of an indictment with inducing certain persons to enter into contracts to acquire shares by making reckless statements and forecasts which were misleading, false or deceptive, contrary to the provisions of the Prevention of Fraud (Investments) Act, 1939, s. 12 (1). When the case for the Crown was concluded it was submitted by counsel for the defendant that the jury should be directed that the word “reckless” in the section implied conduct that must amount to fraud and that if it were shown that an accused person honestly believed in the truth of what he had said or written he could not be guilty of an offence under the section. This report is confined to this point.

I

M. J. H. Turner and J. M. G. Griffith-Jones for the Crown.

H. J. Phillimore, Q.C., and *David A. Lloyd* for the defendant MacKinnon.

P. A. G. Rawlinson for the defendant Limpkin.

Neville Faulks and David Hirst for the defendant Barnett.

R. E. Seaton for the defendant Cole.

F. H. Lawton, Q.C., and *W. McL. Howard* for the defendant Whitehead.

Sebag Shaw for the defendant Whitehead Industrial Trust, Ltd.

SALMON, J.: The Prevention of Fraud (Investments) Act, 1939, s. 12 (1), so far as it is material, reads as follows:

"Any person who, by any statement, promise or forecast which he knows to be misleading, false or deceptive, or by any dishonest concealment of material facts, or by the reckless making of any statement, promise or forecast which is misleading, false or deceptive, induces or attempts to induce another person—(a) to enter into . . . (i) any agreement for . . . acquiring . . . securities . . . shall be guilty of an offence . . ."

It is contended on behalf of the Crown that the word "reckless" in that section means no more than "very careless", and that, accordingly, anyone who very carelessly makes a false statement, promise or forecast and thereby induces or attempts to induce another to enter into any agreement for acquiring securities commits a criminal offence. According to the Crown's argument, providing the accused person is proved to have been very careless, he is guilty of this criminal offence, carrying with it a maximum sentence of seven years' imprisonment, even if he honestly believed in the truth of what he wrote or said.

It is contended on behalf of the defence that the word "reckless" means not caring whether the statement, promise or forecast be true or false, and that if an accused person honestly believed in the truth of what he has said or written he cannot be guilty of an offence under this section. *R. v. Bates* (1) ([1952] 2 All E.R. 842) is a clear decision in favour of the Crown's contention, and is supported by an obiter dictum of the Court of Criminal Appeal*. *R. v. Bates* (1) is a highly persuasive authority, but it is not binding on me.

It is unnecessary for me to say with what profound respect I regard any judgment of *DONOVAN, J.*†, or any observations of the Court of Criminal Appeal. I have, however, the great misfortune to differ from *DONOVAN, J.*, on the true construction of this statute. I do so with misgiving and diffidence, but as I have reached a clear conclusion on the matter I must give effect to it.

It is conceded that the word "reckless" is capable of either of two rival meanings for which the Crown and the defence respectively contend. When a word is used in a statute which may bear one of two meanings I know of no canon of construction that compels the court to adopt the wider of the two meanings merely because it is the wider. The court must look at the word in its context in the statute and decide which meaning Parliament intended it to bear. Moreover, the courts are slow to construe a statute as creating a criminal offence unless the statute does so in the plainest terms.

Ever since the celebrated case of *Derry v. Peek* (2) ((1889), 14 App. Cas. 337) the word "reckless", used in relation to false statements, strongly suggests a statement made not caring whether it be true or false, that is, a dishonest or fraudulent statement as distinct from one which is made with an honest belief in its truth. I am here construing a statute whose very name is the Prevention of Fraud (Investments) Act, 1939. Its purpose, as it proclaims, is to make general provision for preventing fraud in connexion with dealing with investments. Section 12 (1) deals with false statements, promises and forecasts. The cross-heading which immediately precedes this section reads thus: "General provisions for the prevention of fraud". It seems to me, therefore, that it would be wrong to approach this section on the basis that, unless the language

* *Semble*, the dictum in the same case when before the Court of Criminal Appeal, which *LORD GODDARD, C.J.*, expressly said was obiter; see *R. v. Russell* (1953), 97 Sol. Jo. 12.

† *DONOVAN, J.*, delivered the judgment reported in *R. v. Bates* ([1952] 2 All E.R. 842) on an application to the Central Criminal Court to quash a count in an indictment,

A compels me to a contrary view, "reckless" must bear the wide meaning contended for by the Crown rather than the meaning attributed to it in *Derry v. Peek* (2).

It would at any rate be surprising if Parliament, in a section creating a number of offences whose very essence is fraud, had included an offence which has nothing to do with fraud. It is to me, at any rate, almost incredible that if that B had been Parliament's intention it would have carried it out by the use of the word "reckless", a word which, used in relation to false statements, has for about forty years generally been understood by common law lawyers to indicate fraud. When Parliament intends, as in the case of a prospectus, that the careless making of an untrue statement shall constitute a criminal offence, irrespective of fraud, it does so in the clearest language. One has only to look at the Companies Act, 1948, s. 44. I can find no such clear language in the section which C I am considering.

The Crown relies on the following passage, among other passages, in the judgment of DONOVAN, J., in *R. v. Bates* (1) ([1952] 2 All E.R. at p. 844):

"If one analyses s. 12 (1), it is found to deal with three categories of D persons who have induced or attempted to induce other persons to invest money. The first is the person who makes a statement which he knows to be misleading, false or deceptive; the second is the person who dishonestly conceals material facts; and the third is the person who recklessly makes a statement, promise, or forecast which is misleading, false, or deceptive. Categories 1 and 2 obviously refer to persons who are dishonest, but, after E referring to a person who has knowingly made a false statement or has dishonestly concealed material facts, the legislature, introducing its third category by the disjunctive 'or', changes its language altogether. It does not specify a person who knowingly makes a misleading, false, or deceptive statement, promise, or forecast, or dishonestly makes it. It simply specifies a person who recklessly makes these things."

F I agree that s. 12 appears to deal with three categories of persons. To my mind, however, they all three have the common characteristic of dishonesty. There is very little, if any, difference between categories 1 and 2. It would appear that category 2 is included only *ex abundanti cautela* to cover the sort of facts that existed in *R. v. Lord Kylsant* (3) ([1931] All E.R. Rep. 179). If any fact G that is omitted from a statement, promise or forecast is material, it can only be material in that its omission makes what has been said misleading, false or deceptive. If the omission is dishonest, it can only be dishonest because the person who makes it knows that what he has said is false, misleading or deceptive by reason of the omission. I am inclined to think that category 2 is already covered by category 1.

H It is true that the third category is introduced by the disjunctive "or" and involves a change of language which does not include the word "dishonesty". This point, however, does not greatly impress me. It is to be observed that the word "dishonest", which is used in the second category, is not used in the first category; and the second category is also introduced by the disjunctive "or". No one suggests that this is any reason for supposing that the first I category does not involve dishonesty.

In my judgment the legislature intended this section to cover all fraudulent statements, promises and forecasts made for the purposes specified in the section. It might, of course, have read simply: "Any person who dishonestly makes any statement, promise or forecast which is misleading, false or deceptive" and so on. The legislature, however, recites (as is the usual practice in pleadings in civil actions) the well-known elements constituting dishonesty. To make quite certain that it covers the *R. v. Lord Kylsant* (3) type of case, it introduces the words "dishonest concealment of material facts". It is for this purpose

essential to use the word "dishonest" because an innocent concealment would be outside the scope of this section. A

It has also been argued that as the section refers not only to statements and promises but also to forecasts, the section must be intended to cover careless though honest forecasts because of the difficulty in proving the absence of an honest belief in a forecast. I do not think that it is permissible to construe this statute as creating the criminal offence for which the Crown contends, because of the difficulties of proof which might be involved in a contrary construction. B
In any event, once it is proved that the forecast is misleading, false or deceptive, and that there were no reasonable grounds for believing it, there exists powerful evidence that the accused who made the forecast for some purpose of his own either must have known it was untrue or had no reasonable belief in its truth. C
Often in the case of alleged fraudulent statements the only evidence of dishonesty consists of evidence that no grounds exist on which any reasonable man could have believed in the truth of the statement. In my experience, juries are not slow in a proper case to draw the inference of fraud.

For these reasons I am unable to hold that this section, which makes general provisions for the prevention of fraud, has by a sidewind created an offence entirely independent of fraud. I shall therefore direct the jury that the word "reckless" in this section has the same meaning as that attributed to it in the majority of the speeches in *Derry v. Peek* (2). D

Solicitors: *Director of Public Prosecutions* (for the Crown); *Isadore Goldman & Son* (for the defendant MacKinnon); *B. A. Perkoff & Co.* (for the defendant Limpkin); *P. R. Kimber* (for the defendant Barnett); *Sole, Sawbridge & Co.* (for the defendant Cole); *Claude Hornby & Cox* (for the defendant Whitehead and the Whitehead Industrial Trust, Ltd.). E

[Reported by T. J. KELLY, ESQ., Barrister-at-Law.]

Re MANN (a debtor), *Ex parte* THE DEBTOR v. HARRODS, LTD.

[CHANCERY DIVISION (Harman and Danckwerts, JJ.), November 24, 1958.]

Bankruptcy—Petition—Debt of petitioning creditor paid before hearing—Leave sought to withdraw petition—Receiving order made without substitution of new petitioning creditor—Bankruptcy Act, 1914 (4 & 5 Geo. 5 c. 59), s. 5 (7), s. 111. G

A creditor presented a petition in bankruptcy in respect of a debt which was subsequently paid by a third party before the hearing. When the petition came on for hearing, the creditor applied for leave under the Bankruptcy Act, 1914, s. 5 (7), to withdraw his petition. The registrar refused leave, and adjourned the petition for evidence to be brought that there was no other creditor. At the adjourned hearing other creditors attended, but the petition was further adjourned because it was indicated that it might be possible to pay all creditors in full. At the further adjourned hearing it appeared that full payment would not be made, and the registrar made a receiving order, notwithstanding that no creditor had been substituted as petitioner (as might have been done under s. 111 of the Act of 1914) in place of the original petitioning creditor who had been paid. On appeal, H

Held: the registrar had no power in the circumstances to make the receiving order, which must be discharged; and the cause would be remitted to the registrar for him to ascertain whether any creditor wished to be substituted as petitioner. I

A [As to substitution of another petitioning creditor, see 2 HALSBURY'S LAWS (3rd Edn.) 312, para. 591; and for cases on the subject, see 4 DIGEST 146, 147, 1362-1365.

For the Bankruptcy Act, 1914, s. 5 (7), s. 111, see 2 HALSBURY'S STATUTES (2nd Edn.) 335, 420.]

Motion in bankruptcy.

B Appeal by the debtor for an order that the receiving order made against the debtor on Oct. 17, 1958, by the registrar of the Kingston-upon-Thames County Court on the petition of the respondent be discharged and that the petition be dismissed.

C The creditor obtained a judgment of the West London County Court dated Apr. 17, 1958, for £239 7s. 6d. (including £14 2s. costs). On May 19, 1958, execution was levied against the debtor by the sheriff who had been in possession of the goods of the debtor for twenty-one days. On July 3, 1958, the creditor presented a petition in bankruptcy founded on the act of bankruptcy of May 19, 1958. Between the presentation of the petition and the hearing, a third party paid the debt due to the creditor. At the hearing of the petition on July 30, 1958, the creditor, having no further interest in the matter, applied for leave to withdraw the petition under the Bankruptcy Act, 1914, s. 5 (7), and the registrar adjourned the hearing till Aug. 19, 1958, for evidence to be brought as to any further debts due from the debtor. At the adjourned hearing on Aug. 19, 1958, other creditors appeared, but as there seemed to be a prospect of all debts being paid in full, the matter was adjourned till Oct. 17, 1958. On that day a receiving order was made, as the debts had not been paid.

E *D. A. Thomas* for the appellant, the debtor.

B. L. A. O'Malley for the respondent, the petitioning creditor.

HARMAN, J.: The petitioner had, when the petition was filed, an undoubted debt, but, before the petition came on for hearing, the debt and costs were paid by a third party, and the petitioner had no further interest in the matter. F When the matter came on, the petitioner applied to be allowed to withdraw the petition. It will be remembered that, under the Bankruptcy Act, 1914, s. 5 (7), a creditor may not do this without the leave of the court.

G At the hearing on July 30, 1958, the registrar did not give leave to withdraw the petition, but demanded evidence that there were no other creditors. That was a proper course to take, because it would not be right to allow the petition to be withdrawn if there were other creditors who wished to take the matter up. The hearing was adjourned until Aug. 19, 1958, for that purpose. On Aug. 19, 1958, a number of other creditors attended, and the right procedure, in my judgment, was to exercise the jurisdiction given under the Bankruptcy Act, 1914, s. 111*, and substitute another creditor as petitioner, if any of them wished so to be substituted. This is analogous to the procedure in companies winding-up. H That did not happen, because the prospect was laid before the creditors generally that, if another adjournment were granted, everybody might be paid in full. So the matter stood over until Oct. 17, 1958, and, by that time, alas, as in many other cases, there was no money forthcoming. The registrar then took what seems to me to be a course which in my judgment was not open to him: he made a receiving order on what he called his discretion. There I was, however, no petitioner with a debt before him and I do not think that he could make such a receiving order. On the other hand, he does not appear to have given any opportunity to the other creditors to apply to be substituted, or to agree to be substituted, under s. 111; and so the matter has got into a state of confusion. We shall discharge the receiving order

* The Bankruptcy Act, 1914, s. 111, provides: "Where the petitioner does not proceed with due diligence on his petition, the court may substitute as petitioner any other creditor to whom the debtor may be indebted in the amount required by this Act in the case of the petitioning creditor."

and remit the cause to the registrar for him to ascertain whether any, and if so which, of the creditors desires to be substituted. That will leave the point to be taken, which was taken but not argued before us, that no such substitution could be made now, because there is no available act of bankruptcy owing to the dates. I should not have thought that that would prevail, having regard to the history of the matter and the adjournments, with the reasons for them; but the debtor will be entitled to put that point before the registrar, who will make an order either substituting a new petitioner or will, having found nobody willing or nobody able to sustain that role, give the petitioner leave to withdraw his petition.

DANCKWERTS, J.: I agree.

Solicitors: *Cardew-Smith & Ross* (for the appellant); *McKenna & Co.* (for the respondent).

[Reported by R. D. H. OSBORNE, ESQ., *Barrister-at-Law.*]

DIRECTOR OF PUBLIC PROSECUTIONS v. NIESER.

[QUEEN'S BENCH DIVISION (Lord Parker, C.J., Streatfeild and Diplock, JJ.), October 21, 22, November 21, 1958.]

Criminal Law—Receiving—Felony or misdemeanour—Knowledge essential to be proved—Proof of knowledge of category of offence by which property criminally obtained—Inferences of knowledge from recent possession of property obtained by dishonest means—Whether necessary to prove knowledge of specific felony or misdemeanour by which property obtained—Larceny Act, 1916 (6 & 7 Geo. 5 c. 50), s. 33 (1), s. 43 (1).

In order to establish the knowledge essential to a felonious receiving contrary to s. 33 (1) of the Larceny Act, 1916, it is necessary and sufficient to charge and to prove that the accused knew that the property was obtained in circumstances amounting to a felony, but it is not necessary to prove that he knew that it was acquired in circumstances amounting to the specific felony by which it was obtained; so, too, in order to establish the knowledge essential to the misdemeanour of receiving contrary to s. 33 (1) it is necessary and sufficient to charge and to prove that the accused knew that the property was obtained in circumstances amounting to a misdemeanour, as opposed to a felony, but it is not necessary to prove that he knew that it was acquired in circumstances amounting to the specific misdemeanour by which it was obtained (see p. 668, letters E and B, post). Therefore, if the knowledge of the accused that is established is merely that he knew that the property was acquired by dishonest means, he cannot be convicted of the misdemeanour of receiving, for there has not been established against him knowledge of the category of the crime of obtaining the property, that is, that it was obtained by misdemeanour as distinct from felony (see p. 668, letter C, post).

The respondent was charged in two informations with receiving a refrigerator knowing it to have been obtained in circumstances amounting to a misdemeanour, namely, false pretences, and with receiving a television set knowing it to have been obtained in circumstances amounting to a misdemeanour under s. 13 (1) of the Debtors Act, 1869, namely, in incurring a debt on obtaining credit under false pretences, both of which were offences contrary to s. 33 (1) of the Larceny Act, 1916. The respondent elected to be tried summarily and pleaded not guilty. At the trial evidence for the prosecution was given by a Mrs. H., that she had obtained the refrigerator by false pretences and the television set by obtaining credit under false pretences in incurring a debt; both articles were obtained under a credit sale

A agreement. Mrs. H. also gave evidence that the true value of the articles was £58 10s. and £90 6s. respectively, and that almost immediately after she obtained them, in 1956, she sold them to the respondent who paid her £25 for the refrigerator and £35 for the television set. The only other evidence given for the prosecution was that of a police officer who interviewed the respondent over a year later, in 1957, when he found both the refrigerator and the television set at the respondent's premises. He also produced a signed statement by the respondent in which he denied having bought anything other than the television set from Mrs. H., for which he said he paid £40. The justices dismissed the informations. On appeal,

B **Held:** the informations had been rightly dismissed because there was no evidence from which the justices could have inferred that the accused knew that the refrigerator and the television set had been obtained in circumstances amounting to a misdemeanour, as opposed to having been feloniously obtained.

C Per CURIAM: to make admissible evidence of the kind referred to in s. 43 (1) of the Larceny Act, 1916, viz., of other stolen property having previously been found in the receiver's possession and of previous convictions for dishonesty, the property must have been stolen and the receiver must have known, and must be charged with having known, it to have been stolen, and not obtained in any other way (see p. 668, letter F, post).

D Observations on the drawing of inferences from the fact of a person's being found in possession of property recently acquired by dishonest means (see p. 669, post).

E Appeal dismissed.

[As to knowledge at the time of receiving property, see 10 HALSBURY'S LAWS (3rd Edn.) 812, para. 1573; as to the effect of recent possession, see *ibid.*, para. 1575; and as to evidence of the possession of other stolen property, see *ibid.*, pp. 814, 815, para. 1576. For cases as to recent possession, see 15 DIGEST (Repl.) 1152, 11,609-11,618; as to possession of other stolen property, see *ibid.*, 1151, 1152, 11,595-11,608.]

For the Larceny Act, 1916, s. 33 (1) and s. 43 (1), see 5 HALSBURY'S STATUTES (2nd Edn.) 1032, 1038.]

Case referred to:

(1) *R. v. Schweller*, (1924), 18 Cr. App. Rep. 52; 14 Digest (Repl.) 234, 2001.

G Case Stated.

This was a Case Stated by justices for the County of Middlesex in respect of their adjudication as a magistrates' court sitting at the Court House, Lordship Lane, Tottenham. On Apr. 24, 1958, two informations were laid by the appellant, the Director of Public Prosecutions, against the respondent, Brian Douglas Nieser, alleging that the respondent:

H " (1) On a day unknown between June 12, 1956 and June 30, 1956, at Tottenham, received a 'Morphy Richards' refrigerator to the value of £54, knowing it to have been obtained under circumstances amounting to a misdemeanour, that is by false pretences, contrary to s. 33 of the Larceny Act, 1916.

I " (2) On a day unknown between Aug. 18, 1956 and Aug. 31, 1956, received a 'Sobell' television set to the value of £71 10s., knowing it to have been obtained under circumstances amounting to a misdemeanour under s. 13 (1) of the Debtors Act, 1869, that is in incurring a debt or liability, obtaining credit under false pretences or by means of other fraud, contrary to s. 33 of the Larceny Act, 1916."

On May 2, 1958, the informations were tried summarily by the justices, the respondent pleading not guilty. The following evidence was given for the prosecution at the trial. Ethel Amy Honey stated, with regard to information (1),

that she had pleaded guilty before the justices to obtaining a Morphy Richards refrigerator by false pretences from Fleet Electrics, Ltd., in June, 1956, and that that was one of the offences for which she was now serving a sentence of nine months' imprisonment imposed on her at Middlesex quarter sessions, on Feb. 18, 1958. The refrigerator was obtained by her under a credit sale agreement, dated June 12, 1956, on which she had written, as the name of the purchaser, "Edward Smith"; the value of the refrigerator was £58 10s., and she paid a deposit of £4. She further stated that before obtaining the refrigerator, she went to see the respondent at his shop, told him that she was getting the refrigerator and asked if he would like to buy it; the respondent had said that he would like to buy it and she had then obtained it. The refrigerator was delivered to her house where it was not installed but remained standing in the hall until the respondent came to collect it some six hours later, at night. She had accepted £25 from the respondent for the refrigerator. With regard to information (2), Mrs. Honey stated that she obtained a Sobell television set on credit sale terms under an agreement dated Aug. 18, 1956, which showed the credit sale price to be £90 6s; she paid a deposit of £11 6s. and ordered the set, but the agreement was in the name of her son, Edward Honey, and was signed by him although she also signed it "E. Honey" as guarantor. When the set was delivered to her she sold it almost immediately to the respondent, without using it, and he collected it from her on the same night that it was delivered to her. She had accepted £35 from the respondent for the set. Detective chief inspector Eric Shepherd of the Metropolitan Police company fraud department said that he saw the respondent at his premises on Sept. 11, 1957, when the respondent made a written signed statement that he was a second-hand dealer; that he knew the old lady living at 7, Westerfield Road (Mrs. Honey's address); that sometime at the end of 1956, the old lady asked him if he was interested in buying a television set and, having looked at the set at her house, he had agreed to buy it and had given her £40 for it; he then took home the set, which was the same set as that at present in his sitting room; he had not bought anything else from the old lady. Inspector Shepherd said that he called on the respondent again, on Sept. 13, 1957, when he saw a Morphy Richards refrigerator on the upstairs landing in the respondent's house; the refrigerator bore the same serial number as appeared in the credit sale agreement regarding a refrigerator referred to by Mrs. Honey. The respondent denied that he got the refrigerator from Mrs. Honey, and when asked if he gave or obtained a receipt for it, replied that he had not bothered to do so.

At the end of the prosecution's case, it was submitted that there was no case for the respondent to answer since no evidence had been given showing that the respondent knew, in either case, that an offence amounting to a misdemeanour had been committed. It was further submitted that the prosecution had to show, regarding the charge concerning the refrigerator, that the respondent knew that it had been obtained by false pretences in accordance with the particulars of the charge, and, regarding the charge concerning the television set, that he knew that it had been obtained by incurring a debt or liability, or by obtaining credit by false pretences or by means of some other fraud; the prosecution had not produced any evidence to show that this was the case. For the appellant it was contended that the prosecution were not required to prove that the respondent knew exactly what misdemeanour Mrs. Honey had committed; it was sufficient if there was evidence that the misdemeanours were committed and evidence from which it could be inferred that the respondent had guilty knowledge of the circumstances in which the goods were obtained, which was the position here. With regard to the form of the charge relating to the television set, where the misdemeanour alleged was under s. 13 (1) of the Debtors Act, 1869, the justices were referred to *R. v. Schweller** (1) ((1924), 18 Cr. App. Rep. 52), by counsel for the respondent.

* See footnote to p. 665, post.

- A The justices were of opinion that Mrs. Honey had obtained the refrigerator and the television set in circumstances amounting to 'the alleged misdemeanours and that the respondent had bought them from her. The justices were further of the opinion that from the evidence as to the prices paid by the respondent, his statement that he did not bother about receipts, his signed statement that he had bought nothing other than the television set from Mrs. Honey and his other
- B statements and conduct on Sept. 13, 1957, when seen by the police, there was some evidence that he knew at the time when he received them that the goods had been obtained by some dishonest means. The justices were, however, of the opinion that there was no evidence that the respondent knew that it was by false pretences that Mrs. Honey had obtained the refrigerator, and that it was while getting credit by fraud that she obtained the television set. Accordingly, the
- C justices found that there was no case to answer on either information, both of which they dismissed, and discharged the respondent.

The question stated for the opinion of the High Court was whether the justices were correct in holding that there was no case to answer on the informations.

J. H. Buzzard for the appellant, the Crown.

W. M. F. Hudson for the respondent.

D

Cur. adv. vult.

- Nov. 21. **DIPLOCK, J.**, read the following judgment of the court: This court reserved judgment, because, in the course of argument, there emerged an important question of principle as to the essential ingredients of the offence or offences created by s. 33 (1) of the Larceny Act, 1916, which does not appear
- E so far to have been judicially decided, and which is particularly important in an age when transactions by way of credit sale agreements are becoming increasingly common.

[HIS LORDSHIP then read the informations and referred to the evidence called by the prosecution at the trial. He continued:]

- F At the end of the prosecution's case the respondent's counsel submitted that there was no case to answer. The submission was on two grounds, one of which applied to the second information only, and was abandoned in this court. It is sufficient to say that it was based on a misunderstanding of the decision in *R. v. Schweller* (1) ((1924), 18 Cr. App. Rep. 52), which found some support in a passage in former editions of ARCHBOLD'S CRIMINAL PLEADING AND PRACTICE which has been deleted in the most recent edition*.

- G The second ground of submission applied to both informations and was based on the contention that to sustain a charge of receiving property knowing it to have been obtained in circumstances amounting to a misdemeanour which is specified in the charge it is necessary for the prosecution to prove that the accused knew that the property had been obtained by the misdemeanour so specified and not in some other albeit criminally dishonest way.

- H It was contended by counsel for the Crown that just as in a charge of receiving stolen goods knowing them to have been stolen it is unnecessary for the prosecution to prove that the accused knew of the details or even the particular form of the stealing, but that it is sufficient to prove that the accused knew that the property had been stolen generally, so, by analogy, in a charge of receiving property knowing that it has been obtained in circumstances amounting to a mis-
- I demeanour, it is unnecessary for the prosecution to prove more than that the

* *R. v. Schweller* is cited in ARCHBOLD'S CRIMINAL PLEADING AND PRACTICE (33rd Edn.) at p. 783, for the proposition that a charge of receiving goods knowing them to have been obtained on credit under false pretences or by means of fraud other than false pretences alleges an offence which is not known to the law. However, in *R. v. New* ((1957), 41 Cr. App. Rep. 207), which distinguished *R. v. Schweller*, it was held that an indictment charging a prisoner with receiving goods knowing them to have been obtained in circumstances amounting to a misdemeanour under s. 13 (1) of the Debtors Act, 1869, viz., in incurring a debt by obtaining credit under false pretences or by means of any other fraud, was good in law; see Supplement to 33rd Edn. of ARCHBOLD, para. 1333.

accused knew of the circumstances amounting to a misdemeanour generally, without showing that he knew of the particular misdemeanour. He conceded that in a charge of receiving property knowing it to have been obtained in circumstances amounting to misdemeanour it would be insufficient, and indeed would be an effective defence, if it were shown that the accused believed, although erroneously, that the goods had been stolen; but he contended that under the doctrine of recent possession which, on the evidence, was applicable to this case, the justices were entitled to infer that the accused knew the true facts as to the circumstances in which the goods were unlawfully obtained by Mrs. Honey*.

The justices accepted the respondent's submission as correctly stating the law. [HIS LORDSHIP then read the opinion of the justices, who dismissed both informations and discharged the prisoner, as set out in the Case Stated, at p. 665, letters A and B, ante, and continued:]

The question of law put for the consideration of this court is whether the justices were correct in holding that there was no case to answer on either information. This involves two questions: (a) What knowledge of the circumstances in which property was criminally obtained by a third person must be shown to have been possessed by the accused in order that an offence of receiving property obtained in circumstances which amount to misdemeanour, contrary to s. 33 (1) of the Larceny Act, 1916, may be made out? (b) Was there any evidence in this case which would have entitled a jury to find that he in fact possessed that knowledge? The answer to the first question depends on the true construction of s. 33 (1) of the Larceny Act, 1916, which is in the following terms:

"Every person who receives any property knowing the same to have been stolen or obtained in any way whatsoever under circumstances which amount to felony or misdemeanour, shall be guilty of an offence of the like degree (whether felony or misdemeanour) and on conviction thereof liable—(a) in the case of felony, to penal servitude† for any term not exceeding fourteen years; (b) in the case of misdemeanour, to penal servitude† for any term not exceeding seven years."

This phraseology contains two ellipses. The nature of the first of these is apparent in comparing the language of the sub-section with that of sub-s. (4) of s. 33 which deals with very similar offences. Sub-section (1) speaks of "any property". It is only the presence of the word "knowing" followed by a statement of the facts known which connotes that these facts are true and thus by implication qualifies the generality of the expression "any property" by limiting it to "property which has been stolen or obtained in any way whatsoever under circumstances which amount to felony or misdemeanour."

The first part of the sub-section expanded to fill this ellipsis would thus read: "Every person who receives any property (which has been stolen or obtained in any way whatsoever under circumstances which amount to felony or misdemeanour) knowing the same to have been stolen or obtained in any way whatsoever under circumstances which amount to felony or misdemeanour shall be guilty of an offence . . ." Pausing at this point it is relevant to observe that the phrase "under circumstances which amount to felony or misdemeanour" must qualify the participle "stolen" as well as "obtained" for some stealing is neither felony nor misdemeanour but a summary offence only. Receiving goods stolen in circumstances which amount to a summary offence is excluded from the sub-section; it is dealt with separately by an unrepealed section, s. 97, of the Larceny Act, 1861. This construction of sub-s. (1) is reinforced by comparing its wording with the less elliptical wording of sub-s. (4) which refers to "property so stolen or obtained" and not to "property stolen or so obtained".

* Mrs. Honey was the person from whom the respondent obtained the goods.

† Section 1 of the Criminal Justice Act, 1948, abolished penal servitude and provided that where any enactment empowered a sentence of penal servitude to be passed, a sentence of imprisonment could be passed instead.

- A The second ellipsis is to be found in the words " guilty of an offence of the like degree (whether felony or misdemeanour) ". The offence to which that committed by the receiver is to be " of the like degree (whether felony or misdemeanour) " is an offence other than that of which the receiver is himself guilty and must be the only other offence alluded to in the sub-section. It is tempting, having filled the first ellipsis, to say that this offence is the actual offence committed by the
- B person by whom the property was in fact stolen or obtained irrespective of whether its degree was known to the receiver; but this, we think, would be fallacious since the only express allusion to another offence contained in the sub-section is to the offence " known " by the receiver to have been committed.

- C Sub-section (1) expanded to fill the two ellipses thus reads: " Every person who receives any property (which has been stolen or obtained in any way whatsoever under circumstances which amount to felony or misdemeanour) knowing the same to have been stolen or obtained in any way whatsoever under circumstances which amount to felony or misdemeanour shall be guilty of an offence of the like degree (whether felony or misdemeanour) (as the degree of offence known by such person to have been committed by the person by whom such property was stolen or obtained) and on conviction thereof liable (a) in the case of felony to imprisonment for any term not exceeding fourteen years (b) in the case of misdemeanour to imprisonment for any term not exceeding seven years."
- D The sub-section thus creates two classes of offence, one a felony, the other a misdemeanour, according to the circumstances in which the property received was stolen or obtained. It treats property as falling into two classes: (1) property which has been stolen or obtained in any way whatsoever in circumstances which

- E amount to felony and (2) property which has been stolen or obtained in any way whatsoever in circumstances amounting to misdemeanour, and it requires as an ingredient of the offence knowledge by the receiver of at least the category into which the property that he has received falls.

- F Does it require more specific knowledge by the receiver than this of the nature of the offence committed by the person by whom the property was stolen or obtained? Neither the structure of the sub-section itself nor its antecedent legal history compels us to such a conclusion.

- G At common law the offence of receiving was a misdemeanour and was limited to cases of property which was stolen. There is ample authority* that in cases of stolen goods, which are by far the most frequent subject of receiving charges, it is unnecessary to prove detailed knowledge by the receiver of the circumstances of the original taking and this was so not only at common law but also under the Larceny Act, 1861, and is still so under the present sub-section. The Larceny Act, 1861, created by s. 91† the offence of felonious receiving, limiting it to cases of property which had been and was known by the receiver to have been obtained (whether by stealing or not) in circumstances which amounted to felony at common law or under that Act. By a separate section, s. 95†, a new misdemeanour was created of receiving property which had been and was known by the receiver to have been obtained (whether by stealing or not) in circumstances which amounted to misdemeanour under the Act of 1861. Under the law as it stood between 1861 and 1916 there were thus two separate statutory offences chargeable under different sections of the Act of 1861 and a common law misdemeanour of receiving stolen property the stealing of which was not a felony
- I either at common law or under the Act of 1861. It is, we think, plain from the wording of ss. 91 and 95 of the Act of 1861, first, that to constitute the offence of felonious receiving it was necessary to show that the receiver knew that the property received had been feloniously obtained, and that to constitute the statutory misdemeanour of receiving that the receiver knew that the property had been

* See, e.g., *R. v. Montague* (1839), 3 J.P. 149, and *R. v. Sbarra* (1918), 87 L.J.K.B. 1003, and see, generally, 15 Digest (Repl.) 1142-1144, 11,502-11,523.

† Section 91 and s. 95 of the Larceny Act, 1861, were repealed by the Larceny Act, 1916, s. 48 (1) and Schedule.

obtained in circumstances amounting to a misdemeanour, and secondly, that it was sufficient in either case to show that he knew that the property came within the general category of property with which the respective sections dealt; it was not necessary to show that he knew by what specific felony or by what specific misdemeanour the property had been obtained. We think that sub-s. (1) of s. 33 of the Larceny Act, 1916, did no more than to re-enact in a single section provisions corresponding to those of ss. 91 and 95 of the Larceny Act, 1861.

We are therefore of opinion that where property has been obtained in circumstances which amount to misdemeanour it is still sufficient under s. 33 (1) of the Larceny Act, 1916, to charge and to prove that the receiver knew that the property fell into the general category of property which has been obtained in circumstances which do in law amount to misdemeanour and that it is unnecessary to prove that he knew that the property was obtained in circumstances which amount in law to the specific misdemeanour by which they were in fact obtained. On the other hand it is not sufficient merely to prove that the receiver knew that the property fell into the wider category of property which has been dishonestly obtained, for that is equally consistent with an erroneous belief that the property was obtained in circumstances which amount to felony and consequently falls short of establishing that degree of knowledge of the general category into which the property fell which we feel compelled to hold is an essential ingredient of the offence charged.

Similarly, where property has been stolen or obtained in circumstances which amount to felony it is sufficient, and it is also essential, to charge and to prove that the receiver knew that the property fell into the general category of property which has been obtained in circumstances which do in law amount to felony, but it is unnecessary to prove that he knew that the property was obtained in circumstances which amount in law to the specific felony by which it was in fact obtained. But although this is sufficient to establish an offence of felonious receiving under s. 33 (1) of the Larceny Act, 1916, more specific knowledge is required where property has in fact been stolen and it is desired for the purpose of proving guilt to adduce evidence of guilty knowledge of the receiver of the kind referred to in s. 43 (1) of the Act of 1916. This evidence (that is of other stolen property having previously been found in his possession and of previous convictions for dishonesty) is admissible only in the cases where property has been stolen and the receiver knows that it has been stolen. To make such evidence admissible the receiver must be charged with knowing the property to have been stolen and not obtained in any other way even in circumstances which amount to felony.

It follows that in the present case the justices were right in holding as a matter of law that it was not sufficient to show that the accused knew that the goods were obtained by some dishonest means. The prosecution must go further and adduce evidence to show that he knew that they were obtained in circumstances which do in law amount to misdemeanour as opposed to felony. The justices were wrong, however, in supposing that it was necessary for the prosecution to adduce evidence to show that the accused knew the precise nature of the misdemeanour by which the property was in fact obtained.

This brings us to the second question whether in the present case there was any evidence to show that the accused in fact possessed the requisite degree of knowledge and in this connexion to the Crown's contention that the doctrine of recent possession entitled the justices to infer in the absence of any explanation by the accused that he had knowledge of the true facts in which the property was obtained by Mrs. Honey.

It may, we think, be misleading to speak of the "doctrine" of recent possession in cases of receiving. It is a convenient way of referring compendiously to the inferences of fact which in the absence of any satisfactory explanation by the accused may be drawn as a matter of common sense from other facts, including, in particular, the fact that the accused has in his possession property which it is

A proved had been unlawfully obtained shortly before he was found to be in possession of it. The so-called "doctrine of recent possession" is not limited to cases of receiving nor to inferences as to the accused's knowledge or state of mind. The right inference from recent possession may be that the accused himself has stolen the property, as where he is found in the street near the scene of the house-breaking in possession of the property which has been taken from the house which

B has been entered. On the other hand, where property has been stolen and there is nothing in the circumstances to point to the accused's having himself committed the crime of stealing, the proper inference from its being found in his possession may be that he received the property knowing not merely that it had been unlawfully obtained but knowing that it had been stolen. Such an inference is justified by the fact that by far the commonest way in which property is unlaw-

C fully obtained is by stealing. But conversely, where property has been obtained in circumstances which amount to misdemeanour the inference cannot be drawn from its being found in his possession that he knew that it had been obtained in this much less common way as opposed to having been stolen. There may, however, in such a case be facts proved additional to the fact of recent possession which entitle the court to draw the inference that the accused knew the true

D facts as to the circumstances in which the property was unlawfully obtained, as where there is evidence of some association between the receiver and the person who obtained the goods, from which it might be inferred that the receiver was in the confidence of the other person and knew what he had in fact done.

The inference appropriate to the particular facts proved is not a presumption of law, it is merely an inference of fact drawn by applying common sense to the

E proved facts, and there is no "doctrine" that in a receiving case where recent possession on the part of the accused is proved he is presumed, in the absence of evidence to the contrary, to have known the true facts of the way in which the goods were obtained. In the present case there was no evidence of any association between the accused and Mrs. Honey before he bought the refrigerator or between that date and the date when he bought the television set. There was

F ample evidence that he knew that the goods had been obtained by dishonest means and had the goods in fact been stolen and not obtained in the circumstances amounting to a misdemeanour there would, for the reasons we have already indicated, have been a case to answer on the charge of receiving them knowing them to have been stolen. But the facts proved against the accused are precisely those facts from which in so many cases a receiver's knowledge

G that goods had been stolen is rightly inferred, and we see nothing in the evidence from which the justices could infer that the accused knew that the property had been obtained in circumstances amounting to a misdemeanour as opposed to having been stolen. There was thus no evidence of what we have regretfully held to be an essential ingredient of the offences with which the accused was charged, namely, knowledge by him that the property which he received fell

H within the category of property which had been obtained in circumstances which amount to misdemeanour. This appeal must therefore be dismissed.

We should have been glad to have been able to come to a different conclusion, for this case illustrates the difficulty with which the prosecution is faced on a charge of receiving where the goods have in fact been obtained by a misdemeanour such as false pretences. It seems the height of absurdity that the receiver should

I have committed no offence if he erroneously thought that the goods had been obtained by the graver crime of stealing; but, although it is the first time that the matter has come before the court, this appears to have been the law since the offence was first created in 1861, and if the matter is to be remedied, as we for our part think that it should, only Parliament can do so. *Appeal dismissed.*

Solicitors: *Director of Public Prosecutions* (for the appellant, the Crown); *J. H. Fellowes* (for the respondent).

[*Reported by* WENDY SHOCKETT, *Barrister-at-Law.*]

LONDON COUNTY COUNCIL v. MONKS.

[CHANCERY DIVISION (Danckwerts, J.), November 26, 1958.]

Execution—Charging order—County court judgment debt—Whether High Court can make a charging order on, or order payment out of, fund in High Court standing to credit of judgment debtor—County Courts Act, 1934 (24 & 25 Geo. 5 c. 53), s. 136, repealed by Administration of Justice Act, 1956 (4 & 5 Eliz. 2 c. 46), s. 34 (3).

There is now no jurisdiction under which a charging order on, or an order for payment out of, a fund standing in the High Court to the credit of a county court judgment debtor can be made so as to enable the county court judgment creditor to recover his judgment out of the fund in the High Court; this is so because (i) the practice by which the High Court will make an order directing payment out of, or charging, a fund in court in favour of a High Court judgment creditor does not apply in relation to judgments of inferior courts, and (ii), though under s. 136 of the County Courts Act, 1934, a county court judgment could be removed to, and rendered equivalent to, a judgment of the High Court, that section has been repealed by s. 34 (3) of the Administration of Justice Act, 1956.

Brereton v. Edwards ((1888), 21 Q.B.D. 488) considered.

[**Editorial Note.** Apart from statute, the judgment of a county court could not be removed into the superior courts for the purpose of issuing execution thereon; see *Moreton v. Holt* ((1855), 10 Exch. 707).

As to the removal of county court judgments to the High Court, see 9 HALSBURY'S LAWS (3rd Edn.) 280, para. 664, and p. 331, para. 799.

As to charging orders on money in court, see 16 HALSBURY'S LAWS (3rd Edn.) 95, para. 143.

For the County Courts Act, 1934, s. 136, see 5 HALSBURY'S STATUTES (2nd Edn.) 104.

For the Administration of Justice Act, 1956, s. 34, see 36 HALSBURY'S STATUTES (2nd Edn.) 474.]

Cases referred to:

- (1) *Brereton v. Edwards*, (1888), 21 Q.B.D. 488; 60 L.T. 5; 21 Digest 653, 2314.
- (2) *Re Prior, Ex p. Prior*, [1921] 3 K.B. 333; 90 L.J.K.B. 1222; sub nom. *Re Debtor, Ex p. Debtor* (No. 718 of 1920), 125 L.T. 727; 21 Digest 648, 2266.

Adjourned Summons.

The plaintiffs, the London County Council, applied by originating summons for an order that the sum of £2,046 5s. 2d. money on deposit standing credited to the ledger credit "ex parte the London County Council The account of Elizabeth Monks . . ." might stand charged with the payment to the London County Council of £292 14s. 9d. which, by a judgment of the Lambeth County Court made in an action in which the plaintiffs were plaintiffs and the defendant was the defendant, it was adjudged that the plaintiffs should recover against the defendant together with £8 2s. costs, and that no part of the said £2,046 5s. 2d. might be transferred, paid out or otherwise dealt with without notice to the plaintiffs and until the order to be made on this application should be made absolute or discharged.

S. L. Newcombe for the plaintiffs.

The defendant did not appear and was not represented.

DANCKWERTS, J.: This application raises a point of very considerable difficulty, and of some importance. The matter arises out of a compulsory purchase order made by the London County Council in 1947, which was followed by a notice to treat served on a certain Miss Monks, the defendant, on Sept. 14,

- A 1949. On Dec. 22, 1954, the Lands Tribunal awarded compensation in the sum of £2,000 and on Sept. 19, 1955, the London County Council, having acted in accordance with the procedure laid down by the Lands Clauses Consolidation Act, 1845, the £2,000 was lodged in court. On Oct. 10, 1955, notice of entry was given. The defendant appears to have been somewhat determined and refused to move out, and on Feb. 15, 1956, the sheriff took possession.
- B Thereupon the defendant was removed to a hostel and maintained there by the London County Council until May 24, 1957, when she left and went to Blackpool. By the National Assistance Act, 1948, s. 22, the London County Council was required to recover the costs of maintenance of the defendant, and those amounted to £292 14s. 9d. The council took proceedings in the Lambeth County Court to recover that amount, and obtained a judgment, on Feb. 21, 1958, for that sum and £8 2s. costs, i.e., a total of £300 16s. 9d. This application
- C is for payment of the amount of the debt to the London County Council out of the sum of £2,000 and such interest as has since accrued.

The practice before the Administration of Justice Act, 1956, was that the proceedings in the county court were removed to the High Court of Justice by writ or order of certiorari, as under the County Courts Act, 1888, s. 151 (subsequently re-enacted by the County Courts Act, 1934, s. 136) there was power in that way to make the county court judgment equivalent to a judgment of the High Court. Section 136 of the Act of 1934 provides:

- E “(1) A judge of the High Court, if satisfied that a person, against whom judgment for an amount exceeding £20 has been obtained (whether by way of satisfaction of a claim or counterclaim or by way of costs or otherwise) in a county court, has no goods or chattels which can be conveniently seized to satisfy the judgment, may, if he thinks fit, and on such terms as to costs as he may direct, order a writ of certiorari to issue to remove the judgment into the High Court.
- F “(2) When a judgment is so removed, it shall have the same force and effect and the same proceedings may be had thereon as if it were a judgment of the High Court.”

- Under that section it was open to the judgment creditor to proceed in the High Court to enforce the county court judgment in the same way as he would have in the High Court of Justice as regards a High Court judgment; and the Judgments Act, 1838, would apply. The Judgments Act, 1838, s. 14, enables government stock and funds and stock and shares in public companies belonging to the debtor to be charged by order of the judge in favour of a judgment creditor.
- G That section refers only to any judgment which has “. . . been entered up in any of Her Majesty's superior courts at Westminster . . .” Section 12 of the Act of 1838 enables proceedings under fieri facias to be taken. That section provides:

- H “By virtue of any writ of fieri facias to be sued out of any superior or inferior court after the time appointed for the commencement of this Act, or any precept in pursuance thereof, the sheriff or other officer having the execution thereof may and shall seize and take any money or banknotes (whether of . . . the Bank of England, or of any other bank or bankers), and any cheques, bills of exchange, promissory notes, bonds, specialties,
- I or other securities for money, belonging to the person against whose effects such writ of fieri facias shall be sued out . . .”

It is necessary to point out that in that section “inferior court” is referred to as well as “superior court”. On the other hand, it would appear that the right to seize money or banknotes means cash in the form of coins or notes, and would not, for instance, apply to a bank account, which is a chose in action, being a debt owed by the bank on the current account to its customer, and which can be reached by the appropriate manner of garnishee proceedings.

Money in the hands of the Paymaster-General at the bank would seem to me to be in the same position as any other bank account, but there is a line of authorities to which I have been referred which shows that in the case of a fund in court, as it is commonly called, in the case of a High Court judgment at any rate, the court would direct payment out or make a charging order in favour of a High Court judgment creditor. Those cases are *Brereton v. Edwards* (1) ((1888), 21 Q.B.D. 488) and *Re Prior, Ex p. Prior* (2) ([1921] 3 K.B. 333), the latter case being the case of a fund which had been paid to the Official Receiver. The real basis of those cases seems to me to be that where the court has the fund under its own control, as in the case of a fund standing to the credit of some account of the Paymaster-General, the Paymaster-General being the officer of the High Court and all the judges of any division of the High Court being judges of that court, the judges will enforce a High Court judgment by directing their officer to pay out the money or make a charging order on the fund in question, so that the judgment creditor shall not be defeated in regard to satisfaction of the judgment. That was in accordance with the practice of the old Court of Chancery, it appears, before the Judicature Acts came into force. The question, however, is—does that practice also exist in regard to a judgment creditor who is claiming not under a High Court judgment but under a judgment of some inferior court, a county court for instance? I am not satisfied that it does.

The County Courts Act, 1934, s. 136, provided for a county court judgment being made equivalent to a High Court judgment by transfer to the High Court of Justice; but s. 136 was repealed by the Administration of Justice Act, 1956, s. 34. Section 34 (3) of the Act of 1956 provides:

“Section 136 of the County Courts Act, 1934 (which relates to the removal to the High Court of a county court judgment where the judgment debtor has no goods or chattels which can be conveniently seized to satisfy the judgment) shall cease to have effect.”

It would appear that the reason for the passing of that provision was that s. 34 was dealing with the abolition of the writ of *elegit*, and s. 35 (1) provided powers by which

“The High Court and any county court may, for the purpose of enforcing a judgment or order of those courts respectively for the payment of money to a person, by order impose on any such land or interest in land of the debtor as may be specified in the order a charge for securing the payment of any moneys due or to become due under the judgment or order.”

What was being provided, therefore, was a different method of securing payment out of land or out of proceeds of land on a judgment which has been obtained in the appropriate court. It may be that the draftsman of the Act had overlooked the fact that in providing for the repeal of the County Courts Act, 1934, s. 136, the powers relating to a fund in the High Court in the hands of the Paymaster-General might also be affected.

Whether that is so or not is pure speculation. I have to deal with the situation as I find it, and as s. 136 of the Act of 1934 has been repealed, there is no method of removing the county court proceedings to the High Court so as to be equivalent to a High Court judgment; that being so, there is no method by which the funds in the hands of the Paymaster-General can be reached.

It seems to me an unfortunate result because the judgment ought to be satisfied if the debtor has funds, but I am forced to the conclusion that the court does not in practice make an order on the Paymaster-General in the case of a judgment of an inferior court, and no authority has been produced to me which would justify my making an order for payment out of funds in court in the present case.

Application refused.

Solicitor: *Solicitor, London County Council.*

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

A

R. v. EVANS.

[COURT OF CRIMINAL APPEAL (Lord Parker, C.J., Hilbery, Cassels, Barry and Paull, JJ.), November 24, December 1, 1958.]

B

Criminal Law—Sentence—Probation—Concurrent sentence of detention in detention centre for three months and probation order for two years imposed separately on two counts—Whether probation order valid—Criminal Justice Act, 1948 (11 & 12 Geo. 6 c. 58), s. 3 (1), s. 18 (2).

C

In April, 1957, E. was sentenced at quarter sessions to three months' detention in a detention centre on one count of storebreaking and larceny, and, on a second count of storebreaking with intent to commit a felony, a probation order was made for two years' probation to run concurrently. In July, 1958, E. pleaded guilty to two charges of larceny for which he was sentenced by a magistrates' court. He was committed to quarter sessions for sentence for the offence for which he had been placed on probation. Quarter sessions sentenced him to borstal training. On appeal against this sentence,

D

Held: although there was nothing in the Criminal Justice Act, 1948, to prevent a probation order being made on a second count, where an offender was convicted on two counts, to run concurrently with detention imposed for the conviction on the first count, yet to make such a probation order was contrary to the spirit and intention of the Act; accordingly the probation order would be quashed, and the sentence to borstal training fell with it and must also be quashed.

E

SEMBLE: a probation order should not be made concurrently with a sentence the serving of which will postpone the effective commencement of the probation (see p. 675, letters C to E, post).

Appeal allowed.

F

[As to powers of the court on the commission of a further offence during the currency of a probation order, see 10 HALSBURY'S LAWS (3rd Edn.) 504, para. 918; as to probation orders, generally, see *ibid.*, pp. 498, 499, para. 911; and as to detention orders, see *ibid.*, p. 515, para. 939.

For the Criminal Justice Act, 1948, s. 3 (1) and s. 18 (2), see 28 HALSBURY'S STATUTES (2nd Edn.) 352 and 368.]

Appeal.

G

In April, 1957, the appellant, Raymond Frederick Evans, appeared before Surrey Quarter Sessions on two charges, one of storebreaking and larceny and one of storebreaking with intent to commit a felony. He pleaded guilty and was sentenced to three months in a detention centre on the first count and placed on probation for two years on the second count. On July 19, 1958, at Wimbledon Magistrates' Court he pleaded guilty to stealing 8s. from a gas meter and 12s. from his employers and was fined £4 for each offence and committed to Surrey Quarter

H

Sessions on breach of the probation order made in April, 1957. He was sentenced on July 28, 1958, to a term of borstal training. On Nov. 24, 1958, he appealed against this sentence. It was contended on his behalf that a probation order should not have been made in April, 1957, to run concurrently with a sentence of detention; and that as the original probation order was invalid there was no breach which would enable a sentence of borstal training to be imposed. The hearing of the appeal was adjourned for a week in order that a court of five judges might decide whether a probation order could be made where a sentence of detention had already been given.

I

P. A. Bruce for the appellant.

H. J. Leonard for the Crown.

LORD PARKER, C.J., delivered the judgment of the court: This appellant, aged eighteen, pleaded guilty in April, 1957, at the Surrey Quarter Sessions to two offences, one of storebreaking and larceny and the other of storebreaking

with intent to commit a felony. Both offences were committed with another boy on the same night, and the appellant was sentenced to three months in a detention centre on the first count and placed on probation for two years on the second count. In July, 1958, he pleaded guilty to larceny from a gas meter and also to larceny as a servant, and he was fined before a magistrates' court at Wimbledon. On July 28, 1958, he was again brought before Surrey Quarter Sessions on breach of the probation order, when he was sentenced to borstal training. The appellant then applied for leave to appeal to this court against that sentence of borstal training, and the court, being concerned whether the original probation order running concurrently with the sentence of detention was a proper order, extended the time and gave leave to appeal against the original order made in April last.

The relevant sections of the Criminal Justice Act, 1948, are s. 3 and s. 18. So far as they are material they provide as follows. Section 3 (1) provides:

"Where a court by or before which a person is convicted of an offence (not being an offence the sentence for which is fixed by law) is of opinion that having regard to the circumstances, including the nature of the offence and the character of the offender, it is expedient to do so, the court may, instead of sentencing him, make a probation order . . ."

Section 18 (2), which is the section providing for detention in a detention centre, is as follows:

"A court shall not order a person to be detained in a detention centre—
(a) if he has been previously sentenced to imprisonment or borstal training;
(b) if he is not less than seventeen years of age, and has previously been ordered to be so detained since attaining that age; and shall not order any other person to be so detained unless the court has considered every other method (except imprisonment) by which the court might deal with him and is of opinion that none of those methods is appropriate."

It is quite clear that if there had only been one offence it would have been impossible to couple an order for probation with a sentence of three months' detention in a detention centre. By s. 3 (1), which I have read, a probation order could only be made instead of a sentence and by s. 80 of the Act it is provided that "sentence" includes an order for detention in a detention centre. In the present case, however, there were two counts equivalent to two separate indictments, and if one looks at the express words of the Act, there does not appear to be anything which expressly prevents a probation order being made on the second count instead of a sentence on that second count. It may be rather artificial that when the court have both offences before them and have to consider the circumstances, it should be proper for them to treat these two offences as completely separate; and thus that the court should apply their minds, with regard to the first count, to s. 3 and s. 18 and, having dealt with those enactments in relation to the first count, should proceed to apply their minds quite independently in regard to the second count. Be that as it may, it appears to this court that there are no express words which prevent these two orders being made at one and the same time. Though that may well be so, however, the court is clearly of opinion that the making of a probation order in such circumstances is contrary to the spirit and intention of the Act. To take the present case, the proper sentence, as it seems to us, should have been three months in a detention centre on each count to run concurrently. For the court of quarter sessions to substitute probation in regard to the second count is really in the nature of providing for after-care. We are far from saying that some provision for after-care in such a case would not be very highly appropriate. A young man coming out of a detention centre after a period of discipline may need looking after, and it may well be to his advantage to be under the supervision of a probation officer; but the question is whether s. 3

A and the provision for probation can properly be made use of to provide for after-care. The matter becomes really clearer if one considers the position in reverse. Supposing in this case on the first count the court had made a probation order and then gone on in the second count, considering the matter quite independently, to make an order for detention for three months in a detention centre. If one looks at it in that way it becomes quite clear that the only justification for the probation order on the first count would be to provide for after-care. It is also clear that if such an order as was made in this case is properly made it could also be made in the case of imprisonment. For two offences being dealt with at one and the same time, if the argument is right, there could be a short sentence of imprisonment and at the same time a probation order for three months. That clearly could be only for the purposes of after-care, and provision is made in the Criminal Justice Act, 1948, s. 22 (1)*, for after-care.

Again, there is the further point that in the ordinary way a probation order must operate forthwith, whereas in the present case it could not become effective until the appellant was released from a detention centre. No doubt it does happen at times that a probation order and a sentence of imprisonment or indeed detention in a detention centre might run concurrently. Thus, a sentence of imprisonment imposed during the currency of the probation order would not revoke that order. It would merely fall into abeyance, and if the prisoner were released before the expiry of the probation period the probation order would revive and be fully effective. But that is quite a different case from the present when the coming into operation of the order itself is in effect postponed. After all, a court dealing with these two offences at the same time cannot say whether at the end of a three months' period in a detention centre the prisoner will need probation. One of the matters that has to be considered is his character, and it must be his character at the time when the probation order becomes effective. In saying that, the court does not wish to throw any doubt on what is said to be the practice in regard to national service cases. It may well be then that if there is only a short time before the accused has served his full national service it would be proper to make a probation order which would not become fully effective until he was released from the services. But in a case such as this where one is dealing with two offences and where for one offence he is placed wholly and entirely out of the control of the probation officer, it seems to this court that an order for detention in a detention centre and an order for probation are wholly inconsistent.

Accordingly, the result in the present case is that the court must quash the probation order which was made on the second count and substitute for that an order for detention in a detention centre for three months to run concurrently with the order made on the first count. In the result, the sentence of borstal training itself which was imposed as the result of a breach of the probation order must also be quashed and the prisoner discharged. It is quite clear that this young man is a very lucky man in that if he had been committed not for breach of probation but for the offences for which he was fined in July he would undoubtedly have gone to borstal training; but as the borstal training was imposed on breach of the probation order and the probation order has gone, the sentence of borstal training must itself be quashed.

Appeal allowed.

Solicitors: *Registrar, Court of Criminal Appeal* (for the appellant); *Solicitor, Metropolitan Police* (for the Crown).

[*Reported by E. COCKBURN MILLAR, Barrister-at-Law.*]

* The rest of s. 22 of the Criminal Justice Act, 1948, was repealed by the Prisons Act, 1952, s. 54 (2) and Sch. 4, Part 1, and is replaced by *ibid.*, s. 29.

LONDON COUNTY COUNCIL v. CENTRAL LAND BOARD. A

[COURT OF APPEAL (Jenkins, Romer and Willmer, L.J.J.), October 3, 6, 27, 1958.]

Statute—Construction—Practice notes issued by public authority—Whether admissible for consideration in determining a question of the construction of the statute.

Town and Country Planning—Development charge—Determination—Land subject to development viewed as a whole—Estate acquired for building purposes—Heavy expenditure to make part of land suitable—Expenditure exceeding value of whole land for building purposes—Whether development charge exigible—Town and Country Planning Act, 1947 (10 & 11 Geo. 6 c. 51), s. 70 (2). B

Development charge under the Town and Country Planning Act, 1947, s. 70, was to be ascertained on the footing that all the operations for which planning permission had been granted would in fact be carried out. C

Decision of DANCKWERTS, J. ([1958] 1 All E.R. 806) affirmed.

Practice notes provided by the Central Land Board for the assistance of their officials are wholly inadmissible for the purpose of construing the Act, and should neither be considered by the court nor permitted by it to be read as part of counsel's argument. D

[As to what evidence may be admissible on the construction of statutes, see 31 HALSBURY'S LAWS (2nd Edn.) 486, para. 610.]

For the Town and Country Planning Act, 1947, s. 12, s. 14, s. 18, s. 21, s. 69, s. 70, s. 72, s. 102, see 25 HALSBURY'S STATUTES (2nd Edn.) 506, 511, 516, 521, 574, 576, 579, 620; and for s. 1 of the Town and Country Planning Act, 1953, see 33 HALSBURY'S STATUTES (2nd Edn.) 857.] E

Appeal.

This was an appeal by the Central Land Board from the decision of DANCKWERTS, J., reported ([1958] 1 All E.R. 806), that development charge was not payable in respect of an estate of 231 acres, which was acquired by the London County Council under the Housing Act, 1936, and was to be developed as a building site, on the ground that, in assessing the amount of development charge, regard must be had to the land as a whole and, so regarded, the relevant increase in value of the land was nil. After hearing argument the Court of Appeal, by a written judgment read by JENKINS, L.J., affirmed the decision of DANCKWERTS, J., and dismissed the appeal. In view of the fact, of which their Lordships were informed by counsel, that only one other case then remained which depended on the result of their decision, so that provisions of the town and country planning legislation with regard to development charge were substantially spent, the appeal in the present case is not reported in full on the substantive question raised on the appeal. Only a summary of this part of the judgment is printed below, but the observations of the Court of Appeal on the use of Practice Notes* (cf. [1958] 1 All E.R. at p. 810) in relation to the construction of the statute are set out in full. F

G. D. Squibb, Q.C., and Denys B. Buckley for the appellants, the Central Land Board. G

H. E. Francis for the respondents, the London County Council. H

Cur. adv. vult. I

Oct. 27. JENKINS, L.J., reading the judgment of the court, after citing s. 12 (1), (2), s. 14 (1), s. 18 (4), s. 21 (1), s. 69, s. 70, s. 72 (1) and s. 102 (1) of the

* Practice notes issued by the War Damage Commission have been referred to in cases concerned with war damage; see e.g., *City of London Real Property Co., Ltd. v. War Damage Commission* ([1956] 3 All E.R. 236 at p. 239), *affd.* C.A. ([1957] 1 All E.R. 519, see at p. 527). In that instance, however, the notes were considered for the purpose of intimating whether the test which the commission stated therein that they would apply was the correct test.

- A Town and Country Planning Act, 1947, reg. 2 of and the Schedule to the Town and Country Planning (Development Charge) Regulations, 1948 (S.I. 1948 No. 1189), and reg. 3 (1) of the Town and Country Planning (Making of Applications) Regulations, 1948 (S.I. 1948 No. 711), said that the planning permission under which the council had developed the estate had been granted with express reference to an application to develop the whole estate accompanied by detailed plans showing a carefully balanced layout of the whole area, so as to provide not merely housing accommodation of homes of different sizes and types in suitable proportions, but also sites for industry to ensure employment for the occupants, shops, schools, a church or churches, a community centre, open spaces and recreation grounds, and other amenities.

- B The contentions for the appellant board were that the development charge payable was the amount by which the value of the land with the benefit of planning permission exceeded the existing use value, such additional value being measured by normal processes of valuation. Planning permission merely permitted, but did not oblige, the owner to develop in a particular way. The hypothetical purchaser must be considered, and he would want to make the largest profit possible. Apart from the question of notional sale, the council, if so minded, could have confined their operations to such parts of the estate as could profitably be developed. If it were otherwise, it would mean that the council, having bought the site at existing use value after their predecessors in title had been compensated for loss of development value, would have got planning permission free; whereas if they had purchased the land before the Act they would have paid a price commensurate with unrestricted rights of user, such a result being inconsistent with the scheme of the Act.

- For the council it was argued first that the planning permission was sought and obtained on the footing that the estate as a whole would be developed in a balanced and integrated manner as indicated on the plans, and that the development by the council, or assignees from them, of parts only of the estate selected by reference to economic considerations, would have involved a radical departure from the permitted proposals and would not be within the permission at all. That was putting the case too high, in the court's opinion, but this much could be said; that such an expedient of selective development would have been a breach of faith and might have exposed the council or the hypothetical purchaser to a risk of revocation of the planning permission under s. 21 (1).

- There was, however, a second and more powerful argument. It was said that, having regard to s. 69 and s. 70, a development charge was exigible in respect of actual operations in the way of development, and not in respect of mere permission to develop, so that a development charge was to be ascertained on the footing that the permitted operations would in fact be carried out. That contention was fully justified. Under the provisions of those sections, a charge was to be levied [s. 69 (1)] "in respect of the carrying out of any operations"; the application for planning permission must be by a person having a sufficient interest in the land; the board had power to refuse to assess the charge unless satisfied

"that the applicant is able to carry out those operations, and that he will do so within such period as the board consider appropriate";*

- I the provisions of those sections were in some points only consistent with, and in no point inconsistent with, the council's view. That view was supported also by the provisions of the statutory regulations, and by the wording of the statutory form of application for planning permission issued thereunder. It followed, therefore, that the declaration made by DANCKWERTS, J., was right, and that the appeal should be dismissed.

There was, however, a further point. At the hearing below, counsel for the plaintiffs had been allowed to read as part of his argument certain "Practice

* This is an extract from proviso (b) to s. 70 (1) of the Act.

Notes, being notes on Development Charges " under the Act, provided by the board for the assistance of their officials*. Such notes were wholly inadmissible for the purpose of construing the Act, and the judge should have declined to consider them. It was not a desirable practice to allow such inadmissible matter to be read as part of counsel's argument in a case involving the construction of statutory provisions. Such notes inevitably derived persuasive force from the fact that they represented the views of the persons charged with the administration of the Act and, therefore, possessing special knowledge of its provisions, and however much counsel might disclaim reliance on them otherwise than as part of his argument, their use might well result in the court being influenced by official opinion, albeit unconsciously, on questions of construction, the decision of which properly rested on the court alone.

Appeal dismissed.

Leave to appeal refused (it having been stated that there was only one case outstanding which involved the same question).

Solicitors: *Treasury Solicitor* (for the appellants); *Solicitor, London County Council* (for the respondents).

[Reported by HENRY SUMMERFIELD, Esq., Barrister-at-Law.]

PRACTICE DIRECTIONS

Practice—Trial—Date—Fixing date for trial of non-jury action—Altering fixed date.

Practice—Trial—Setting down action for trial in Middlesex—Lists—Applications concerning dates for trial.

Practice—Trial—Speedy trial—Order on summons for directions.

The following are Practice Directions† for Middlesex given by the LORD CHIEF JUSTICE on Dec. 9, 1958:—

1. (1) Every action ordered or required to be set down in the Queen's Bench Division for trial in Middlesex shall be set down in the appropriate list.

(2) The appropriate list for actions in the Queen's Bench Division for trial in Middlesex shall be:—

(a) Where the action is ordered to be tried by a judge and jury, the jury list:

(b) Where the action is ordered to be tried by a judge alone, the non-jury list:

(c) Where the action is ordered to be tried by a judge alone but the time estimated for the trial does not exceed two hours, the short cause list:

(d) Where the action is transferred for trial in the commercial court, the commercial list:

(e) Where the action includes a claim by or against the Crown which relates to taxes or duties or to penalties provided for by the enactments relating to revenue, the revenue list:

(f) Where the action consists of a motion for judgment, the motions for judgment list:

(g) Where the action comprises any of the following matters, the special paper list, namely:—

(i) A special case under R.S.C., Ord. 34, r. 1 or r. 2, other than a special case ordered to be tried in the commercial court:

(ii) A trial of questions of fact under R.S.C., Ord. 34, r. 9:

(iii) Awards in the form of a special case under s. 21 of the Arbitration Act, 1950:

* These notes were referred to by DANCKWERTS, J., see [1958] 1 All E.R. at p. 810, letter B to p. 811, letter E.

† See, generally, as regards setting down for trial R.S.C., Ord. 36, r. 5, and as regards directions concerning lists etc., *ibid.*, r. 6; these rules were substituted by R.S.C. (No. 2), 1958 (S.I. 1958 No. 1246), r. 4.

- A** (iv) Motions under s. 22 of the Arbitration Act, 1950, to remit an award or under s. 23 of the Arbitration Act, 1950, to remove an arbitrator or umpire or to set aside an award:
- (v) Points of law under R.S.C., Ord. 25, r. 2:
- (vi) Any other special case or case stated under any statute except such as are required to be entered in the divisional court list.
- B** 2. (1) All actions in the non-jury list shall in the first instance be set down in a non-jury general list.
- (2) As soon as an action is set down in the non-jury general list, any party may, on obtaining an appointment from the Clerk of the Lists for this purpose, give notice to the other party or parties of his intention to apply to the Clerk of the Lists to fix a date for the trial of the action. Such notice shall be in writing and shall state the date proposed by the party giving it and the party to whom such notice is given may suggest an alternative date. Suitable forms of notice may be obtained at the office of the Clerk of the Lists.
- C** (3) On the hearing of the application for a fixed date the Clerk of the Lists shall, in default of agreement between the parties and subject to the provisions of sub-para. (6) hereof, fix a date for the trial of the action. All actions in the non-jury general list so allocated fixed dates for trial shall be placed in a non-jury fixture list; and all other actions shall remain in the non-jury general list.
- D** (4) A list will be posted outside the office of the Clerk of the Lists (Room 419) showing the fixtures for each day as they are allocated and the vacant dates. This list will be brought up to date each day at or after 4.0 p.m.
- E** (5) (a) The non-jury fixture list will be maintained in four parts, and actions will be placed in any part of the non-jury fixture list in which there is a vacant date.
- (b) Four judges will be available each sittings to take actions in the non-jury fixture list, but no list or part of a list will be allocated to a particular judge.
- F** (6) If, on the hearing of an application for a fixed date, one of the parties objects on the ground that the hearing of the action will or might thereby be delayed, the Clerk of the Lists may, instead of fixing a date for trial, leave the action in the non-jury general list and direct that the action be marked not to come on for trial before a date agreed between the parties or in default of agreement a date specified by him. In specifying such a date, the Clerk of the Lists will have regard to the time reasonably necessary to enable the parties adequately to prepare for trial.
- G** (7) If any party is dissatisfied with the date fixed by the Clerk of the Lists or with his direction under the last preceding sub-paragraph hereof, he may, on giving two days' notice in writing to the other party or parties, apply to the judge in charge of the non-jury list to vary the date so fixed or the direction so given. Such application to the judge shall be made within seven days of the hearing before the Clerk of the Lists and on the hearing of such application the judge may vary the date fixed, or the direction given by the Clerk of the Lists or may order the case to remain in the non-jury general list or make such other order or give such other direction on such terms as to costs or otherwise as he shall think fit.
- H** (8) If an application under sub-para. (2) of this paragraph be not made within
- I** four weeks from the date when the action is set down for trial the action shall remain in the non-jury general list.
- (9) (a) When an action in the non-jury fixture list is settled, withdrawn or discontinued it shall be the duty of the solicitors for the parties so to inform the Clerk of the Lists forthwith. In this event the Clerk of the Lists will remove the action from the non-jury fixture list and the fixed date will be vacated.
- (b) When a date in the non-jury fixture list has been vacated for any reason

the parties in any action fixed for a later date may, if they agree, apply for their action to be fixed for the date so vacated. **A**

(10) Once an action has been allocated a fixed date for trial and has been placed in the non-jury fixture list no alteration (except on an application to take an earlier vacated date) will be granted without the leave of the judge in charge of the non-jury list. Leave to alter a date by postponement will be given only for good cause shown and the judge may in any case order as a condition of postponement that the action should be placed in the non-jury general list and should not be allocated a fixed date. **B**

3. (1) On the hearing of the summons for directions the court or judge may, if it appears that the action ought to have an early trial, give a direction (to be called "an order for speedy trial") that an application be made to the Clerk of the Lists to fix a date for the hearing. **C**

(2) Within one week from the making of an order for a speedy trial or within such other time as may be specified in the order the parties shall apply for a date to the Clerk of the Lists who shall, in default of agreement between the parties, arrange as early a date for the trial of the action as practicable.

(3) If any party is dissatisfied with the date so arranged he may make application to the judge in charge of the non-jury list and the provisions of sub-para. (7) of para. 2 shall apply to such application. **D**

4. (1) Except in cases dealt with under paras. 2 and 3 hereof, every application to fix, vacate, alter or otherwise determine the date of trial of an action in any of the lists of actions in the Queen's Bench Division for trial in Middlesex shall be made:—

(a) In the case of an action in the jury list to the judge in charge of the jury list: **E**

(b) In the case of an action in the non-jury general list, in the short cause list, the revenue list, the motions for judgment list or the special paper list, to the judge in charge of the non-jury list:

(c) In the case of an action in the commercial list, to the judge in charge of the commercial list. **F**

(2) Any party making an application under this paragraph shall give the other party or parties notice of his intention to apply to the judge in charge of the appropriate list. The notice shall be not less than one clear day before the date on which such application is proposed to be made and shall specify the nature of the application and the grounds thereof.

(3) On the hearing of an application under this paragraph the judge shall have regard to the wishes and interests of the parties, the state of the lists and all the circumstances of the case. The judge may grant or refuse the application or make such other order or give such other direction on such terms as to costs or otherwise, as he shall think fit. **G**

(4) All applications to the judge in charge of the appropriate list shall be made at the sitting of the court or at such other time or times as may be specified by such judge for the time being. **H**

5. The lists of actions in the Queen's Bench Division for trial in Middlesex shall be kept by the Master of the Crown Office and shall be included in the general list of appeals and causes in the Supreme Court of Judicature published for each sittings.

6. (1) For each week of each sittings there shall be published a list of non-jury actions to be called the "Pending List of Non-Jury Actions". **I**

(2) The pending list shall be printed on the first day and on every subsequent Monday of each sittings, and on the day of its publication delivery of the pending list at the addresses of subscribers in London will be made by attendants of the Royal Courts of Justice.

(3) The pending list shall contain:—

(a) A number of actions in both the non-jury general list and the non-jury fixture list which are likely to be tried or have been fixed for trial during the

A next succeeding week which will be listed together under the denomination of the "Week's List".

(b) The remaining actions in the non-jury general list which have been set down on or before the end of the previous week, except actions which have by order or by consent been stood out from the non-jury general list. The pending list will, if possible, contain an intimation that actions in the non-jury general

B list will not be taken before a date or dates to be specified.

(c) The remaining actions in the non-jury fixture list fixed for hearing during the current sittings.

7. (1) A number of actions which are likely to be taken on the following day will be listed together and printed in the daily cause list under the denomination of the "Warned List". Such actions will be taken from those standing at the head of the "Week's List".

C (2) No action in the warned list will be removed from it by stay or postponement or will have its position altered except by leave of the judge in charge of the appropriate list.

D 8. The regulations and directions issued by the LORD CHIEF JUSTICE in September, 1888, Mar. 24, 1948, Oct. 5, 1948, Jan. 14, 1957, and Apr. 1, 1957, are hereby revoked.*

9. These directions shall come into operation on Jan. 1, 1959.

Dec. 9, 1958.

PARKER OF WADDINGTON, C.J.

E

F

PRACTICE DIRECTION.

RESTRICTIVE PRACTICES COURT.

Restrictive Trade Practices—Court—Practice—Interlocutory applications—Consent orders.

G By virtue of the power conferred on me by r. 49 of the Restrictive Practices Court Rules, 1957, I hereby give the following general direction:—

All applications in England and Wales in interlocutory matters (other than applications under r. 33 and r. 65) where the terms of the proposed order have been agreed by the parties shall until further order be dealt with by the clerk of the court who may at his discretion, after or without hearing the parties, either dispose of the same himself or adjourn them to the judge.

H In all such applications a draft of the proposed order indorsed with a consent by all parties shall be left with the proper officer of the court.

PATRICK DEVLIN,

President.

Dec. 2, 1958.

* In addition the note published as a direction at [1957] 1 All E.R. 422 concerning postponement of cases in the non-jury list should be read as subject to the present directions which, it is thought, supersede it.

INLAND REVENUE COMMISSIONERS *v.* HINCHY.

[QUEEN'S BENCH DIVISION (Diplock, J.), December 1, 2, 1958.]

Income Tax—Return—Incorrect return—Penalty—Treble the tax which he ought to be charged—Whether treble the total amount of tax payable for year of assessment or only treble amount of tax on income not returned—Income Tax Act, 1952 (15 & 16 Geo. 6 & 1 Eliz. 2 c. 10), s. 25 (3) (a).

The interest on the defendant's Post Office Savings Bank account for the year ending with Apr. 5, 1952, was £51 5s. 9d. In the return of his income for the purposes of assessing him to income tax for the year 1952-53, which he signed on Apr. 19, 1952, and delivered to the Commissioners of Inland Revenue, he stated that his income from this source for the year was £18 6s. The commissioners, having discovered the understatement from other sources than the defendant, made an additional assessment on him in November, 1955, under Sch. D for £14 5s. income tax at the standard rate on the difference between the true interest and the stated interest, viz., £32 19s. 9d. In June, 1956, the commissioners brought an action claiming from the defendant under s. 25 (3) (a) of the Income Tax Act, 1952, the £20 fixed penalty and also "treble the tax which he ought to be charged under this Act", which sum they computed at £418 14s. 6d., being three times his total income tax (£139 11s. 6d. including the £14 5s.) for the year 1952-53.

Held: (i) at the time when the action was begun no tax remained to be charged on the defendant, i.e., to be quantified by assessment on him, since the assessment had been made, and there was then, therefore, nothing with which he ought to be "charged" within s. 25 (3) (a); accordingly only the fixed penalty of £20 and no more was recoverable in the action (see p. 686, letter I, post).

(ii) on the true construction of s. 25 (3) (a) the treble tax penalty was three times the amount of the tax (in this case £14 5s.) with which the defendant ought to be charged, viz., the increase in tax with which he should be charged on the excess of the true income over the amount that he had returned, but was not three times the total tax for which he ought to be charged on all his taxable income for the relevant year of assessment, because the former construction of s. 25 (3) (a), which was a penal enactment, rendered the penalty more rational in relation to the default than did the latter construction (see p. 685, letter I, and p. 688, letter D, post).

Dicta of COZENS-HARDY, M.R., and FLETCHER MOULTON, L.J., in *A.-G. v. Till* ([1909] 1 K.B. at pp. 700, 702) considered.

[**Editorial Note.** If the writ had been issued before the tax had been quantified by assessment, it seems that the discretionary power of amendment, which is conferred by s. 55 (3) of the Income Tax Act, 1952, would have been applicable in the absence of fraud (see p. 686, letter H, post).

As to the recovery of income tax penalties, see 20 HALSBURY'S LAWS (3rd Edn.) 717, para. 1441; and as to their recovery before the General Commissioners, see *ibid.*, p. 718, para. 1444.

As to proceedings for penalties in the county court, see 20 HALSBURY'S LAWS (3rd Edn.) 718, para. 1442.

For the Income Tax Act, 1952, s. 25 (3), see 31 HALSBURY'S STATUTES (2nd Edn.) 37.]

Cases referred to:

- (1) *Whitney v. Inland Revenue Comrs.*, [1926] A.C. 37; 95 L.J.K.B. 165; 134 L.T. 98; 10 Tax Cas. 102; 28 Digest 105, 649.
- (2) *A.-G. v. Till*, [1909] 1 K.B. 694; 78 L.J.K.B. 708; 100 L.T. 275; *revsd.* H.L., [1910] A.C. 50; 79 L.J.K.B. 141; 101 L.T. 819; 5 Tax Cas. 440; 28 Digest 103, 641.

A Action.

In this action by specially indorsed writ the Commissioners of Inland Revenue, the plaintiffs (referred to hereinafter as "the commissioners") claimed from Albert Edward Hinchy, the defendant, the sum of £438 14s. 6d. as a penalty payable under the Income Tax Act, 1952. Pursuant to s. 19 of the Act of 1952, the defendant delivered to H.M. Inspector of Taxes a statement, signed by him on Apr. 19, 1952, which purported to be a true and correct return in the prescribed form of all the sources of the defendant's income and of the amount derived from each source for the year ended Apr. 5, 1952, this being the year preceding the year of assessment, i.e., 1952-53. The return was not a true and correct return in that the defendant had understated the amount of his income from "interest on accounts and deposits in banks including Post Office and other savings banks", stating his income from an account at a Post Office Savings Bank to be £18 6s. when in fact it was £51 5s. 9d. The defendant's explanation for understating the amount of this income was that he intended to transfer to savings certificates and other non-taxable funds any savings in excess of those which yielded £18 per year. When the understatement of income was discovered from the returns which Post Office Savings Banks are required to make of interest they have allotted to customers, an additional first assessment under Sch. D was made on the defendant, on Nov. 30, 1955, for the amount of the understated income the tax on which was £14 5s. On Mar. 9, 1956, an assessment under Sch. E in respect of the year ended Apr. 5, 1952, was made on the defendant. At the date of the issue of the specially indorsed writ, on June 13, 1956, assessments had been made on the defendant in respect of all the tax to which he was liable for the tax year 1952-53.

By reason of the incorrect return made by the defendant he became liable to forfeit, under s. 25 (3) of the Income Tax Act, 1952, the sum of £20 and "treble the tax which he ought to be charged" under the Act of 1952, and the commissioners now claimed under s. 25 (3) a penalty amounting to £438 14s. 6d., being three times the total amount of tax payable by the defendant for the year 1952-53, viz., £139 11s. 6d. (comprising £14 5s. Sch. D tax and £125 6s. 6d. Sch. E tax), plus £20. The question arose as to the true meaning of the words "the tax which he ought to be charged" in s. 25 (3).

A. S. Orr for the Commissioners of Inland Revenue, the plaintiffs.
The defendant appeared in person.

G DIPLOCK, J.: This is an action commenced by writ dated June 13, 1956, brought by the Commissioners of Inland Revenue against the defendant, Mr. Hinchy, for penalties under s. 25 (3) of the Income Tax Act, 1952. The circumstances are simple, but the consequences of those circumstances, since they depend on the construction of a particularly difficult Act, are less simple than the circumstances themselves.

H [HIS LORDSHIP then stated the facts and continued:]

The commissioners in this case claim a penalty in the amount of £438 14s. 6d., that amount being three times the total amount of tax payable by the defendant in respect of the tax year 1952-53, plus £20, not, it is to be noted, three times the tax on the amount which he had understated.

I The basis of that claim by the commissioners is s. 25 (3) of the Income Tax Act, 1952, which I have to construe. I find it a very difficult sub-section, and I gather that I am not the only one to have done so, because in two standard text-books on income tax, *SIMON'S INCOME TAX** and *KONSTAM ON INCOME TAX†* in the current editions, diametrically opposed views are expressed as to the meaning of this sub-section so far as quantum of penalties is concerned. Since I am faced with a difficult sub-section to construe, it would have been of great

* *SIMON'S INCOME TAX* (2nd Edn.), Vol. 1, p. 290, para. 417; *SERVICE VOLUME*, Vol. 1, para. 499f.

† *KONSTAM ON INCOME TAX* (12th Edn.), Ch. 17, para. 333.

assistance to me if I had had the point argued by counsel on each side. The defendant has appeared in person, and consequently I have had to rely on counsel for the commissioners to give me such assistance as he can on the construction of this difficult Act. A

Section 19 of the Income Tax Act, 1952, with which I must start, provides:

"Every individual, when required so to do by a notice given to him by the surveyor, shall, within the time limited by the notice, prepare and deliver to the surveyor a true and correct return in the prescribed form of all the sources of his income and of the amount derived from each source for the year preceding the year of assessment, computed in accordance with the provisions of this Act except that the computation of income shall be made by reference to the year preceding the year of assessment and not by reference to any other year or period." B C

Then there is a proviso relating to surtax, from liability for which the defendant was fortunately absolved. What is required, therefore, is a true and correct return of all the sources of income and of the amount derived from each source for the year preceding the year of assessment. In point of fact and as a matter of practice s. 25 (6) applies in the defendant's case, as in most cases. Section 19 deals with a notice given by the surveyor of a requirement to make the return. D Section 25 (6) provides:

"If a person delivers to any surveyor a list, declaration or statement on a form prepared for the purpose by direction of the Commissioners of Inland Revenue, he shall be deemed for the purposes of this section to have been required by a notice under the preceding provisions of this Chapter [that is, s. 19] to prepare and deliver that list, declaration or statement, and the time limited for the delivery thereof shall be deemed for the purposes of this section to have expired on the date of its delivery to the said surveyor." E

The form which the defendant filled in was the form prepared for the purpose by direction of the Commissioners of Inland Revenue. Section 25 (3), on which the point in this case turns, is in the following terms: F

"A person who neglects or refuses to deliver, within the time limited in any notice served on him, or wilfully makes delay in delivering, a true and correct list, declaration, statement or return which he is required under the preceding provisions of this Chapter to deliver shall—(a) if proceeded against by action in any court, forfeit the sum of £20 and treble the tax which he ought to be charged under this Act . . ." G

I pause there to note that that is a fixed penalty. The court, if action is brought in court, can award only that penalty, not less. Then sub-s. (3) goes on to deal with a maximum penalty: H

"(b) if proceeded against before the General Commissioners, forfeit a sum not exceeding £20 and treble the tax which he ought to be charged under this Act, and where he is proceeded against before the General Commissioners, the penalty shall be recovered in the same manner as any other penalty under this Act, and the increased tax shall be added to the assessment." I

Counsel for the commissioners contends that those words "the tax which he ought to be charged under this Act" mean the total amount payable by the person chargeable for the year of assessment, and the claim in this case is made on this basis. If counsel is right, it means that if a person with an income of a profession or trade or otherwise which renders him liable to tax and surtax of £20,000 in the year, by mistake understates by £1 or less the amount of his

A income from one source, or if he gives the amount correctly but misdescribes the source, or indeed if he overstates his income by any amount however large or small, he is liable to a penalty of £60,020. I suppose also, and counsel for the commissioners indeed so concedes, having regard to s. 30 of the Act, that he is liable to the like penalty if he makes a mistake in the list of his employees which he is required to make under s. 27 of the Act.

B It is right that in considering that consequence of the construction for which counsel for the commissioners argues, one should bear in mind the provisions of s. 55 of the Act, which excuse a person from penalties if he remedies timeously his default. Section 55 (1) provides:

C “A person who has delivered a statement or schedule and discovers any omission or wrong statement therein may deliver an additional statement or schedule rectifying the same, and shall not thereafter be liable to any proceeding by reason of his omission or wrong statement.”

Sub-section (2) of s. 55 provides similarly in respect of non-delivery of a statement; sub-s. (3) provides that if proceedings have already been started before the General Commissioners, and it is proved to their satisfaction that no fraud or evasion is intended, they may, but not must, stay the proceedings, and so in the case of a certificate from the commissioners the court may also stay the proceedings.

D Apart from that relief, which may be available in appropriate cases, the consequences which I have indicated follow—I think inescapably—from the construction for which counsel for the commissioners has contended. If that is what Parliament meant by sub-s. (3) of s. 25 I must, of course, apply it, but the consequences seem to me to be absurd and unjust, and if there is some other possible construction consistent with the words which leads to results less absurd and unjust, I should be inclined, and I think rightly inclined, to adopt it.

E I think that there is an alternative construction. As LORD DUNEDIN pointed out in *Whitney v. Inland Revenue Comrs.* (1) ([1926] A.C. 37 at p. 52), there are three stages in the imposition and collection of tax, the first stage a general declaration of the liability of the subject, which is made by s. 1 of the Income Tax Act, 1952, and the appropriate section in the annual Finance Act; stage two, quantification of that liability by means of assessment by the commissioners in accordance with the provisions of the Act, and stage three the recovery of the tax. While the phraseology of the Income Tax Act, 1952, is by no means uniform, F Part 2 appears to use the expression “chargeable” in relation to persons, property and profits and during the first stage, that is to say before the liability has been quantified by assessment. It appears to treat tax as having been charged on the person assessed when, and only when, the assessment has been made. G Section 25 (3) imposes a liability of treble the tax which he, that is the person proceeded against, ought to be charged under this Act, an expression which having regard to the terms of s. 148, means, in relation to Sch. D, the H tax which ought to be charged on him.

I It is to be noted that the expression is “ought to be charged”, not “ought to have been charged”. It seems to me that a reasonable meaning of the expression is the tax to which he ought to be charged, that is to say duly assessed, but to which he has not been charged or duly assessed by reason of the default. That is to say the increased tax which, when one looks at the latter part of the sub-section, is to be added to the assessment. Sub-section (4) of s. 25 appears to me to support this construction. It reads as follows: “The commissioners shall also [a significant word] proceed to assess or cause to be assessed every such person who makes default as aforesaid”, that is to say they shall charge on him the tax which ought to be charged. This seems to me to assume that the result of the default has been a failure to assess, as also seems to be implicit in the use of the expression “increased tax” which in sub-s. (3) is said shall be added to

the assessment. The assessment to which the commissioners must proceed under sub-s. (4) where, as in this case, there has already been a first assessment, will take the form of an additional first assessment under s. 41 (1) (ii), where it is to be observed a similar expression is used, and which provides:

“ . . . the Additional Commissioners shall make an assessment on the person chargeable, in an additional first assessment, in such a sum as, according to their judgment, ought to be charged . . . ”

Such an assessment is an assessment of the tax to which he ought to be duly assessed but has not been by reason of the default.

The phraseology of sub-s. (3) of s. 25 is to be contrasted with that of s. 48 (1), which deals with the penalties which can be exacted in cases of fraud. It reads as follows:

“ Where a person who ought to be charged with tax, as directed by this Act, is not duly assessed and charged by reason that he has [committed one of four kinds of fraudulent conduct set out] such person shall, on proof thereof to the General Commissioners for the division in which he has been charged, or, if he has not been charged, then for any division in which he is chargeable, be assessed and charged treble the amount of the charge which ought to have been made upon him.”

Then there is a proviso:

“ Provided that, if any charge has been made, but that charge is less than the charge which ought to have been made, such person shall be assessed and charged, over and above the former charge, treble the amount of the difference between the charge which was made and the charge which ought to have been made, such amount to be added to the assessment.”

I draw attention to the use of the past tense: “ The amount of the charge which ought to have been made ” in s. 48 as contrasted with the use of the present tense: “ the tax which he ought to be charged under this Act ” in s. 25 (3). Section 48 seems to me to express in clearer language and lengthier language what is intended to be conveyed by the elliptical expression in s. 25 (3), the tax which he ought to be charged. This construction of the sub-section leads to the difficulty in determining at what point of time one must ascertain the amount of tax which he ought to be charged.

The answer must, I think, be the date at which the proceedings, whether before the court or the General Commissioners, are brought. I am supported in this view by the provisions of s. 55, to which I have already referred, which prohibit proceedings being brought if the matter has been remedied before the proceedings are started, but if proceedings are started before the matter has been remedied, leaves it to the discretion of the General Commissioners or the court as the case may be, whether the proceedings are then stayed. In the present case, the proceedings were started on June 13 after the defendant had been charged with all the tax for which he was liable. There was, therefore, at the date of the proceedings no tax remaining on which he ought to be charged under the Act, nor was there any increased tax which could be added to the assessment had proceedings been brought before the General Commissioners instead of before the court. On the construction which, as I have indicated, appeals to me of the sub-section, the only amount recoverable under the sub-section in this case would be the fixed penalty of £20.

Is there any authority which prevents me from adopting the construction which I think is the better construction of this difficult sub-section? Counsel

A for the commissioners has referred me to *A.-G. v. Till* (2) ([1909] 1 K.B. 694; reversed in the House of Lords, [1910] A.C. 50). That was a case brought under the corresponding section of the Income Tax Act, 1842, s. 55. The relevant distinction between that section and the present s. 25 (3) is that the words are in this form in s. 55 of the Act of 1842:

B “... if any person who ought by this Act to deliver any list, declaration, or statement as aforesaid shall refuse or neglect so to do within the time limited in such notice,” etc.,

then he shall be liable to a penalty of £50 if prosecuted in any of Her Majesty's
C Courts, and before the commissioners, “forfeit any sum not exceeding £20, and treble the duty at which such person ought to be charged by virtue of this Act...” Therefore, so far as the penalty before the commissioners is concerned, they were substantially in the same terms as under the present Act, the other difference between the two Acts being that instead of there being an express reference to a true and correct return, there are the words “as aforesaid”. In the Court of
D Appeal ([1909] 1 K.B. 694) the view was taken by their Lordships that the words “as aforesaid” should not be construed as referring to a true and correct return, that is to say as introducing the words “true and correct” before “list, declaration, or statement”. The reasoning which appealed to the Court of Appeal in coming to that conclusion was an examination of the consequences which would follow if the section applied to cases where there had been an error, however
E slight or however innocent, in a return. For that reason the Court of Appeal came to the conclusion that on the true construction of s. 55, the words “as aforesaid” did not introduce into the section the qualification “true and correct”.

The decision was reversed by the House of Lords, but as counsel for the commissioners has pointed out, two of the members of the Court of Appeal,
F COZENS-HARDY, M.R., and FLETCHER MOULTON, L.J., did express the view that the penalty exigible before the commissioners, expressed in the terms “treble the duty at which such person ought to be charged by virtue of this Act”, did mean the whole of the tax payable by that person ([1909] 1 K.B. at pp. 700, 702). I think that the Master of the Rolls must have taken that view because he
G points out that the penalty is greater than the penalty for fraudulent statements, and that was three times the tax on the difference. FLETCHER MOULTON, L.J., said in terms that that is the view he took as to the meaning of the penalty section, and it was because, among other reasons, they thought the penalty was so largely exorbitant and so inappropriate in a case where there had been a minor error in a return that they came to the conclusion that the words “true
H and correct” were not introduced. The House of Lords ([1910] A.C. 50) reversed that decision and they held that the words “as aforesaid” did introduce the words “true and correct” as qualifying the return. Since the proceedings were proceedings for a penalty before the courts, it was limited to £50; it was not necessary for their Lordships in *A.-G. v. Till* (2) to express any view as to the maximum amount of the penalty which could be recoverable before the commissioners, and accordingly no such view is expressed.

I Counsel for the commissioners, however, points out that none of their Lordships expressed any dissent from the view which the Court of Appeal had expressed as to what penalty was recoverable before the commissioners, but it was not of course necessary for their Lordships to do so. He has also drawn attention to a number of other passages in the speeches in which various of the members of the House of Lords draw attention to the high penalty which is exacted. I do not think, however, that I can find in that case any express

indication that any of their Lordships have considered the possible alternative views as to the amount of the penalty. A

I am therefore left with the opinions expressed in the Court of Appeal decision. They are, I apprehend, obiter, and it was because of the absurd consequences of construing the section as imposing such a penalty that the Court of Appeal felt compelled to hold that it did not apply to the sort of case where there had been an omission. B

What the same members of the Court of Appeal would have held was the true amount of the penalty once they were constrained by the decision of the House of Lords to hold that s. 55 did apply to a case of a minor omission, I do not know, but I think that it is clear that any court approaching a penalty section, and approaching a penalty section as I must approach it, on the view that it does apply to a minor omission such as the defendant made in this case, must construe it in favour of the subject and against the size of the penalty, if the words are reasonably capable of such a meaning. I do not think, therefore, that there is any authority which constrains me to hold that the meaning for which counsel for the commissioners contends is to be preferred to the meaning which I have indicated, and which has the result of making the penalty more rational in relation to the default than the construction which counsel has put forward. I bear in mind the warning which has been given so many times, and which was given indeed in the House of Lords in *A.-G. v. Till* (2) against being too hopeful of finding any rationality in the scheme set out under the Income Tax Act. It does seem to me, however, that where there is a construction which makes the scheme less irrational than another, it is one which I should prefer. C D E

In my view, in the circumstances of this case, the commissioners are entitled to recover only the sum of £20.

[An order for costs was asked for by the plaintiffs and was refused, the action having been within the jurisdiction of a county court.]

Judgment for the Commissioners of Inland Revenue, the plaintiffs, for £20. F

Solicitor: *Solicitor of Inland Revenue* (for the Commissioners of Inland Revenue, the plaintiffs).

[Reported by WENDY SHOCKETT, Barrister-at-Law.]

A

Re H. R. HARMER, LTD.

[COURT OF APPEAL (Jenkins, Romer and Willmer, L.J.J.), November 10, 11, 12 13, 14, 17, 1958.]

B

Company—Oppression—Voting control—Founder of business retaining voting control on transfer of business to limited company—Sons of founder life directors and executive managers of business—Autocratic exercise of power by founder rendering it just and equitable that the company should be wound-up, but winding-up being unfairly prejudicial to members—Companies Act, 1948 (11 & 12 Geo. 6 c. 38), s. 210 (1), (2).

C

On July 1, 1947, a company was formed to acquire a business which had been founded many years earlier by H. (referred to hereinafter as "the father"), who was born in 1869. Two of his sons, C. and B., went into the business on leaving school (C. in 1921 and B. in 1931). The nominal capital of the company was £50,000 divided into thirty-nine thousand preference shares of £1 each (which for present purposes could be disregarded), ten thousand "A" ordinary shares of £1 each, and one thousand "B" ordinary shares of £1 each. All the ordinary shares had been issued. The residue of profits in each year available for dividend was divisible among the holders of the "A" ordinary shares. The "B" ordinary shares conferred no right to participate in the profits but carried the whole of the voting power. In a winding-up the "A" and "B" shares were to rank equally as regards return of capital and participation in surplus assets. In July, 1947, the father sold all the assets of his business to the company for £33,325 the consideration being satisfied by the issue of shares. He nominated his sons as allottees equally of (apart from preference shares) 6,750 "A" ordinary shares and 240 "B" shares. The holdings of "A" and "B" shares at the date of the petition subsequently mentioned were that the father held 1,028 "A" shares and he and his wife (who voted as he wished) held 786 "B" shares; C. held 4,611 "A" shares and C. and his wife held 107 "B" shares, and B. held 4,361 "A" shares and B. and his wife held 107 "B" shares.

D

E

F

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H

I

By the company's articles, the father was appointed governing director for life, but no special rights were attached to that office; C. and B. each became a life director; and the father was appointed chairman of the board of directors with a casting vote. The father considered that he was entitled to disregard resolutions of the board as long as he held the voting control. He assumed powers which he did not possess and exercised them against the wishes of shareholders (namely C. and B.) who had major beneficial interests but a minority of votes. It was conceded that at the time of the presentation of the petition next mentioned the facts would justify the making of a winding-up order on the ground that it was just and equitable that the company should be wound-up. By a petition presented on Oct. 1, 1957, C. and B. applied to the court for an order under s. 210* of the Companies Act, 1948, complaining that, owing to the actions of the father, the affairs of the company were being conducted in a manner oppressive to some part of the members, including themselves. On appeal from an order granting relief under s. 210, it was contended on behalf of the father that the sons were not entitled to the order for the following reasons, among others, viz., (a) it was not shown that the affairs of the company were "being conducted in a manner oppressive to" the sons as members, but only as directors; (b) the sons were not entitled to complain of the father's conduct, because they had acquired their ordinary shares as a gift from him, and because it had been recognised from the time when the company was formed that the father intended to retain control of it; (c) the acts complained of might have been lawfully done by calling a general meeting

* This section is printed at p. 698, letters B to E, post.

and passing the requisite resolutions; and (d) this was not a case of discrimination between different shareholders or classes of shareholders.

Held: (i) in s. 210 of the Companies Act, 1948, the word "oppressive" meant "burdensome, harsh and wrongful".

Definition given by VISCOUNT SIMONDS in *Scottish Co-operative Wholesale Society, Ltd. v. Meyer* (ante, at p. 71) adopted (cf., p. 701, letters H and I, p. 706, letter E, and p. 707, letter I, to p. 708, letter A, post).

(ii) relief under s. 210 had been rightly granted because, viewing the events proved as a consecutive whole, the affairs of the company had been conducted in a manner oppressive to the sons as members, not merely as directors, and, even if the father's acts might lawfully have been done with the authority of a general meeting, the sons were entitled to require that the proper procedure should be followed, it being irrelevant, if it were indeed the fact, that the original acquisition of shares by the sons was a gift from the father; moreover, s. 210 was not confined to discrimination between classes of shareholders, nor was oppression limited to such as was designed to obtain pecuniary advantage, as distinct from such as expressed an overweening desire for power.

Per ROMER, L.J. (adopting a passage from the judgment of ROXBURGH, J.): to assume power that one does not possess and to exercise that against the wishes of shareholders who have major beneficial interests but a minority of votes is *prima facie* oppression, and shifts the burden of proof (cf., p. 707, letter E, post).

Appeal dismissed.

[As to the alternative remedy to winding-up in cases of oppression, see 6 HALSBURY'S LAWS (3rd Edn.) 542, para. 1044.]

For the Companies Act, 1948, s. 210, see 3 HALSBURY'S STATUTES (2nd Edn.) 630.]

Cases referred to:

- (1) *Elder v. Elder & Watson, Ltd.*, 1952 S.C. 49; 10 Digest (Repl.) 857, 2438.
- (2) *Loch v. Blackwood (John), Ltd.*, [1924] A.C. 783; 93 L.J.P.C. 257; 131 L.T. 719; 10 Digest (Repl.) 856, 5643.
- (3) *Thomson v. Drysdale*, 1925 S.C. 311; 10 Digest (Repl.) 864, 2462.
- (4) *Re Yenidje Tobacco Co., Ltd.*, [1916] 2 Ch. 426; 86 L.J.Ch. 1; 115 L.T. 530; 10 Digest (Repl.) 863, 5683.
- (5) *Meyer v. Scottish Co-operative Wholesale Society*, 1954 S.C. 381; 3rd Digest Supp.; further proceedings, 1957 S.C. 110; *affd.* H.L., sub nom., *Scottish Co-operative Wholesale Society, Ltd. v. Meyer*, ante, p. 66.
- (6) *Baird v. Lees*, 1924 S.C. 83; 10 Digest (Repl.) 866, 2472.

Appeal.

This was an appeal by the respondent, Henry Revell Harmer, the chairman of H. R. Harmer, Ltd., from an order made by ROXBURGH, J., on May 12, 1958*, under s. 210 of the Companies Act, 1948, on a petition presented by Cyril Henry Carrington Harmer (referred to hereinafter as "Cyril") and Bernard Bertram Dorkin Harmer (referred to hereinafter as "Bernard"), two of the directors of the company. The respondents to the petition were the company, Mr. and Mrs. Harmer (the chairman and his wife, the parents of Cyril and Bernard), but neither the company nor Mrs. Harmer appeared or was represented at the hearing before ROXBURGH, J.

The chairman, who is referred to hereinafter as "the father", was born in 1869. He founded the business (in 1918 according to the evidence of the petitioners, and in 1894, according to his own evidence), and carried it on with the assistance of Cyril and Bernard, Cyril having joined it in 1921, and Bernard

* ROXBURGH, J., gave his main judgment on Apr. 30, 1958, and his judgment on the appropriate remedial measures on May 1, 1958.

A in 1931. By 1935 Cyril had become responsible for the day-to-day management of the London office of the business and from that time the father ceased to take a major part in the routine conduct of the business. In 1946 Bernard went to New York to take up the office of vice-president of H. R. Harmer Incorporated (referred to hereinafter as "the American company"), all the shares of which were then owned by the father as one of the assets of the business.

B The father was the president and Cyril was a director of the American company but Bernard was in charge of the day-to-day business of that company.

The respondent company was incorporated on July 1, 1947, with a view to acquiring, and shortly after its incorporation did acquire, the business of philatelic auctioneers and valuers formerly carried on by the father, including the issued share capital of the American company which belonged to him.

C By the articles of association, the first directors were the father, Cyril, Bernard and another son (who subsequently resigned), all of whom were to be life directors not subject to retirement at annual general meetings of the company. The father was to be chairman of the board of directors for life. He was also to be governing director, but the articles contained no provision conferring any powers on the governing director or restricting the powers of the other directors.

D Regulation 68 of Table "A" and Sch. 1 to the Companies Act, 1929 (which applied to the company) was modified by omitting therefrom all the words therein after the words "from any cause to be a director", and, therefore, a director appointed to the office of managing director, or manager, was not liable to have his tenure of office as managing director or manager determined by a resolution of the company in general meeting. The quorum of directors, unless

E otherwise fixed (which had not happened) was two. The shareholding in the company at the date of the petition was: (a) "A" ordinary shares—the father 1,028; Cyril 4,611; Bernard 4,361; (b) "B" ordinary shares—the father 491; Cyril 4, Bernard 4; the father's wife 295; Cyril's wife 103; Bernard's wife 103; (c) preference shares—the father 11,029; Cyril 5,291; Bernard 3,230; Cyril's wife 150; Bernard's wife 150. The remaining 14,152 of the issued preference

F shares were held by other members of the family, by directors and former directors of the company, and by the American company. The facts regarding the acquisition of shares and the agreements between the father, the sons, and the company concerning executive management are set out in the judgment (see p. 694, letters A to H, post).

G The following is a summary of the matters of which the petitioners complained and which were mentioned in the judgments of JENKINS, L.J., and ROMER, L.J., as instances to which, or to some of which, they each referred. (a) In or about January, 1948, the father, having gone to Australia to investigate the possibilities of opening a branch there, committed the company without the authority of the board of directors (and, in fact, in spite of protests from the other directors in answer to one of which he replied "unless my judgment accepted shall exercise

H my agreed control of the company to compel my views") to setting up a branch business in Australia. The Australian business had not proved to be profitable. (b) In 1954 the father purported to dismiss summarily a Mr. Edwards, who had been employed in the business before the company was formed and was appointed a director on the formation of the company. The reason for the purported dismissal was the father's annoyance because Mr. Edwards had

I written a letter to Bernard about a collection of postage stamps and (among other reasons) had not referred to the father in the letter. In reply to a letter from his father saying "I have sacked Ed . . ." Cyril answered that he proposed to call a board meeting to discuss the position; his father replied "I forbid it and shall exercise my position as controlling shareholder to prevent you doing so". Although Mr. Edwards, in fact, remained in the company's employment, the father prevented his re-election as a director. By means of his casting vote as chairman, he procured the appointment of directors whom he expected to vote as he directed. The story of the appointments of directors,

who often did not hold office for long, supported the conclusion that, in making appointments the father was guided by the question whether the appointees would vote as he wished. (c) In a letter, dated Apr. 22, 1954, and addressed to the then secretary of the company, the father said that no board meetings were to be called without his agreement. (d) After a visit to Australia in 1954, the father, who had been accompanied by his wife, procured a cheque to be drawn on the company's banking account by the secretary to reimburse him, not only for his own expenses, but also for a proportion of his wife's expenses, although the board had passed a resolution in 1947 that, while the expenses of directors incurred on journeys undertaken on the company's business should be paid by the company, the expenses of their wives should not be paid by the company. When the secretary protested, the father replied that he was the company and that the secretary was to do as she was told. (e) At board meetings on May 13 and July 4, 1955, the father refused to renew the service agreement of a Mr. Buck, a director of the American company, although Mr. Buck's services would have been of particular value to the company at that time. (f) In or about July, 1955, the father suspected that some of the senior members of the staff might be untrustworthy and stealing the company's property. Instead of raising the matter with the board, he engaged a detective to keep watch on the staff, and, when the matter came to the sons' knowledge, refused to give them any information. The staff knew that they were being watched and resented it. (g) In September, 1956, after the board had agreed to pay £450 as remuneration to Mr. Dalwick, a director, the father wrote to some members of the staff forbidding the payment of the remuneration and making charges, against Cyril and the secretary, in regard to the accuracy of the records of meetings. (h) In September, 1956, the father told a prospective employee of the company that Cyril was "wrong in the head" and would not be with the company much longer. (i) In May, 1957, Bernard learned that the chairman was contemplating procuring the sale of the share capital or undertaking of the American company and had first taken steps to that end in October, 1956, giving written instructions to an agent and his lawyer in New York to negotiate the sale, without the knowledge of his co-directors in either company. The proposed sale became known in philatelic circles in New York and was detrimental to the interests of the company. The sons prevailed with the father not to go further with the negotiations which he had in hand, but the father refused to undertake not to continue his activities in the matter without the sanction of the board. (j) Negotiations having been in progress in regard to the renewal of the lease of the company's premises in Bond Street, it was resolved at a board meeting on May 29, 1957, to authorise the company's surveyors to conclude the negotiations at a specified figure. On June 3, 1957, the father wrote to the surveyor instructing him not to proceed with the negotiations. On account of the delay thus caused, the company lost the opportunity of making an advantageous bargain for the renewal of the lease.

The petitioners prayed for the following relief:

(i) that the regulations of the company might be altered so as to confer on the holders of all ordinary shares the right to one vote per share; (ii) alternatively, that the father should be ordered to sell to the petitioners all his "A" and "B" ordinary shares, or, alternatively, all his "B" ordinary shares; (iii) that the father should be relieved from his office as a director of the company, and that the company's articles of association should be altered accordingly, on the company's undertaking to pay to the father and his wife such pension as the court might think proper; or (iv) that such order should be made as would be just. ROXBURGH, J., held that the petitioners had proved their case, and His LORDSHIP made an order under s. 210 of the Act of 1948, but (with the agreement of the petitioners) not in the terms of the prayer in the petition.

A *Harold Brown, Q.C.*, and *J. L. E. MacManus* for the chairman of the company (the father).

Milner Holland, Q.C., and *Denys B. Buckley* for the petitioners (the sons).

JENKINS, L.J.: This truly lamentable litigation concerns a company called H. R. Harmer, Ltd., and comes before us on appeal from an order of ROXBURGH, J., dated May 12, 1958, whereby he granted relief under s. 210 of the Companies Act, 1948, at the instance of two sons of Mr. H. R. Harmer, the founder of the business. The two sons are life directors. The father, Mr. Harman senior, is also a life director and, as will later be seen, in point of voting power controls the company. The company carries on in succession to Mr. Harmer senior (referred to hereinafter as "the father") a large and, one might say, world-renowned business of philatelic auctioneering and dealing in and valuing stamps. The father, who is upwards of eighty-eight years of age, has been concerned in this class of business all his life, and according to him he commenced the business, which he later transferred to the company, as long ago as 1894. One finds the date 1918 given in some parts of the evidence as the actual date when he set up the present business, but I think it is clear that he was in fact doing business of this kind at a much earlier date. I think he said that his first dealing in stamps took place as long ago as 1886. The father, from whatever the exact date may have been, carried on this business on his own account and he was sole proprietor of it until 1947 when the company was formed to take over the business. There were three sons, of whom one, Leslie, was concerned in the business only from 1947 until 1951. The other two are Cyril and Bernard. Cyril left school in 1921 and went into the business; Bernard left school in 1931 and likewise entered the business; Leslie entered the Colonial service and left that service for the purpose of joining the company when it was formed. According to Cyril, by 1935 the day-to-day management of the business in London was left to him. On the outbreak of war in 1939 Cyril joined the army and he had the misfortune to be taken prisoner and was a prisoner of war for the rest of the period of hostilities. In 1940 the father and his wife went to the United States of America and there the father opened a branch in New York. In June, 1940, a United States company called H. R. Harmer Inc. was incorporated to take over this business and the father owned all the shares in that American corporation. He stayed in the United States until 1945, and during his absence in the United States the London business was carried on by a Mr. Edwards, an old employee of the business, with the help of Bernard. In 1945 the father and his wife returned to England and shortly afterwards sent Bernard to take charge of the business in the United States, and Bernard has been in charge of that business ever since. His co-director, or one of his co-directors, in that business is Mr. Buck. Cyril, on his release as a prisoner of war, returned to the business in London. In 1946 there were discussions between the father and the sons about the formation of a limited company. It is not clear from whom the initial suggestion came and I do not think that it matters. The upshot of these discussions was that the company H. R. Harmer, Ltd. was formed on July 1, 1947. It was formed to acquire and did acquire the English business and all the shares in the United States business. The nominal capital of the company was £50,000 divided into thirty-nine thousand preference shares of £1, ten thousand "A" ordinary shares of £1, and one thousand "B" ordinary shares of £1. The whole of the ordinary shares, "A" and "B", and most of the preference shares have been issued. The preference shares conferred on the holders a right to a dividend of four per cent. and priority as to capital in a winding-up, but they did not confer any right to any surplus assets in the winding-up. The "A" ordinary shares had the right to the residue of the divisible profits, and the "B" ordinary shares conferred no right to participate in the profits but carried the whole of the voting power. On a winding-up the "A" and "B" shares were to rank equally for return of capital and participation in surplus assets.

On July 11, 1947, a sale agreement was entered into between the father and the company. Under that agreement the father sold to the company the whole of the assets of the business, including the shares in the United States company, for the sum of £33,325. That consideration was to be satisfied by the issue to him or nominees of his of 22,325 preference shares, all the ten thousand "A" shares and all the thousand "B" shares. The father nominated the sons as allottees in equal shares of 6,750 of the "A" shares and 240 of the "B" shares. There was further an agreement that on his death the remaining 3,250 "A" shares and 760 "B" shares allotted to the father were to be offered to the three sons. Under the articles of association the father was to be chairman of the board of directors and as such was entitled to a casting vote in the event of equality of votes. Further, by the articles the father was appointed governing director for life but no special rights were attached to that office. He also had a service agreement appointing him managing director for ten years from Aug. 31, 1946, at a salary of £3,000 a year. That agreement expired in 1956 and was not renewed, but, I understand, no special powers were delegated to him in his capacity as managing director. Cyril was appointed a director for life and London executive manager at a salary of £2,500. His post of London executive manager was likewise for ten years from August, 1946, and that was renewed in 1956 for a further seven years at a salary of £3,500. Bernard was likewise appointed a director for life, and he, too, had a service agreement under which he was an executive manager at a salary of £2,250 per annum likewise for ten years from August, 1946. Leslie gave up his career in the Colonial service and was appointed a life director and executive manager for a similar period of ten years from August, 1946, at a salary of £2,000. Under the arrangements made, the three sons were to purchase certain preference shares at par. Cyril was to take five thousand of these shares, Bernard four thousand and Leslie two thousand. I have already referred to the option given to the sons to purchase the father's shares on his death.

After the formation of the company various changes took place in the shareholdings which are not altogether easy to follow. It appears that in 1949 advice was taken as to the position in regard to estate duty and I think also income tax, and it was pointed out that the father's position of absolute control might create difficulty. As a result the father transferred to the three sons his remaining 3,250 "A" shares in equal shares, that is 1,083 "A" shares each to Cyril and Bernard, and 1,084, including the one odd share, to Leslie. He also transferred 270 of his "B" shares to his wife. That situation was modified when Leslie left the company in 1951. On the occasion of his leaving an agreement was entered into under which he gave up his employment and his shareholding and the benefit of the option. He was suitably compensated for these matters. His "A" shares were transferred in equal shares to the father, Cyril and Bernard, and his "B" shares were transferred to the father, Cyril, Bernard and the father's wife. At some stage Cyril and Bernard each transferred 103 of his "B" shares to his wife, and the result of these somewhat complicated readjustments was to make the present capital situation as set out in para. 7 of the petition by which Cyril's and Bernard's application to the court was initiated. Paragraph 7 is in these terms: "The present shareholding of the company is as follows", and then there are three columns: "A" ordinary, "B" ordinary, and preference. As to the "A" ordinary, the father holds 1,028, those being the shares which he took when Leslie left; Cyril holds 4,611, and Bernard 4,361. As to the "B" ordinary shares, the father holds 491, Cyril four, Bernard four, the father's wife 295, Cyril's wife 103, and Bernard's wife 103. Then as to the preference shares, 11,029 are held by the father, 5,291 by Cyril, 3,230 by Bernard, and a hundred and fifty each by Cyril's wife and Bernard's wife. That accounts for the whole of the "A" ordinary and "B" ordinary shares, and 19,850 of the preference shares. Then para. 7 of the petition goes on:

"The remaining 14,152 of the issued preference shares are held by other

A members of the [father's] family and by directors and former directors of the company and its subsidiary company hereinafter mentioned."

In those circumstances the position as regards the control of the company, ignoring the slight differences while Leslie was with the company, was this. The father and his wife held respectively 491 and 295 "B" shares, making a combined holding of 786 of such shares. The two sons held four "B" shares each and their respective wives held 103 "B" shares each. The "B" shares, as I have said, are the only shares in the capital of the company carrying any right to vote. On the other hand, the two sons held approximately nine-tenths to the father's one-tenth of the "A" shares which carry substantially the whole of what is now conveniently, though erroneously, termed the equity of the company. The holdings of preference shares can, I think, for present purposes be ignored.

So far as the directorate was concerned, the father and the two sons were all life directors, the father being chairman with a casting vote. The father, as I have said, is also styled governing director but no special powers or duties are assigned to that office. It follows that, until the date of order made by ROXBURGH, J., the father was in a position to control the company by the use of his own and his wife's votes, their combined preponderance of voting power being sufficient to procure the passing of extraordinary and special as well as ordinary resolutions. The learned judge found, and there is evidence to show, that the father's wife agreed with him, when her holding of "B" shares was transferred to her, to vote in accordance with his directions, and it is to be assumed that she would in fact always do so. The sons, Cyril and Bernard, claim that the father has repeatedly abused his controlling power in the conduct of the company's affairs to a point which has left them no option but to apply to the court for relief under s. 210, and this they have accordingly done by presenting to the court on Oct. 1, 1957, the petition on which the order under appeal was made, the respondents to such petition being the father and the company.

The gist of the sons' complaint is stated in para. 16 of the petition in these comprehensive terms:

"Notwithstanding the incorporation of the company and its acquisition from him of the said business the chairman [the father] has continued to regard the business of the company as though it was still his own absolute property and to ignore the interests of the shareholders of the company and in particular of your petitioners, the wishes of his co-directors and the resolutions of the board of directors of the company. He asserts that he is entitled to adopt this attitude towards the company and its members and directors by virtue of his shareholding and that of [his wife], in the knowledge that [his wife] is likely always to exercise the voting rights attaching to her 'B' ordinary shares as [the father] directs. He also asserts (contrary to the fact) that he is so entitled by virtue of his being named as governing director in the company's articles of association."

I should, at this point, also refer to the first few lines of para. 17 :

"The [father] has always acted as though the sole right of appointing and dismissing the senior staff of the company is vested in himself and he extends this attitude to embrace the directors of the company claiming that his views alone are to be considered as to who shall be appointed or elected a director and whether or not a director should be removed from office or be not re-elected. He also considered that no director should express a contrary view to that expressed by himself."

The question in the case is whether these general complaints, exemplified and supported as they are by reference to a number of particular matters to which I will return, suffice, on the footing that they are established by the evidence, to make out a case for relief under s. 210. It should be stated at the

outset that ROXBURGH, J., accepted in substance the whole of the evidence adduced in support of the petition, about which there is really very little dispute, and, having seen and heard the father giving evidence before him, he said this in his judgment:

"The father is undoubtedly a man of international reputation of a high order, and let nobody think that I do not regard him even now as an asset to this company. Unfortunately, in common with all of us, he gets older and older. The purpose of this action is not so much to rake up the past as to redeem the future; and, therefore, I cannot deny my anxiety from the mere physical circumstance that every day the father is getting older and older, because, as events, which I shall have to record in detail, will painfully show, his conduct is perhaps characteristic of very old men, shows no sign of improvement, and might in the normal course be expected to deteriorate. He is, in fact, more than eighty-eight years of age now. He suffers from one of the familiar disabilities of old age, namely, deafness. He is very deaf. He is so deaf that he can only hear what is said to him if he stands at a suitable distance from, and, I think, actually facing, the person speaking to him. I mention that at an early stage. As a witness he was most unsatisfactory, mainly, I think, because of his deafness, but partly on account of his age and slower comprehension of what was put to him, when, with difficulty, he understood what was being said. There will be many matters in the course of this judgment in which I shall not have accepted his evidence. I feel in duty bound to mention that, in case some ingenious argument is ventilated elsewhere that something appears on some shorthand note which the judge did not say he did not believe. I am going to say at every stage why I have found the facts exactly as I find them, even if it appears to some extent from what the father said either in his affidavit or in his cross-examination. I must say that as in duty bound; but I wish to make it quite plain that this is not in my view the type of case in which someone has come here to deceive the court. I use no offensive words about the father's evidence. I attribute his shortcomings to things to which we are all subject, age and infirmity. None the less, when I am considering autocratic interference in the day-to-day affairs of a business, the havoc which can be wrought by age and infirmity is self-evident. I hope that I have done justice to the father, who is undoubtedly a very great man in the world of stamps, and it is just because he is such a great man that some of his wholly indefensible actions in connexion with the company's business must have done damage to the reputation of the company not only in this country but all the world over."

I should also refer to this passage in the judgment of ROXBURGH, J.:

"From the very moment of the incorporation of the company the [father] has acted, and acted consistently, not merely down to but even since the presentation of the petition, on the footing that he can whenever he likes override any decision of the board, or regulate any matter of the company's business exactly as he wishes without any formality, even by the method of giving instructions direct to the staff behind the backs of his co-directors. If at the outset he believed that he had power to do this—a point on which I do not find it necessary to make any finding—he certainly became aware at an early stage that he had not, and his reaction was not to change his conduct or attitude in the light of the newly acquired knowledge (if new it was) but to endeavour to pack the board with voters on whom he could rely, an attempt which, in fact, failed miserably as the sequel will show. The result is that for a long time he has been deliberately interfering with the company's business and overriding the board in a manner which he knew to be beyond his powers. This has had and is still having a detrimental effect

A on the company's business, and accordingly on all its 'A' ordinary shareholders, of which shares he holds, as I have said, about one-tenth, and the petitioners hold the rest."

B Next I must note the very important circumstance that it was agreed before ROXBURGH, J., that the facts proved or admitted would suffice to make out a case for a winding-up order under the "just and equitable" rule*. I should also call attention to these passages from the father's evidence. The first is from his first affidavit, para. 21:

C "I deny that the affairs of the company are being conducted in a manner oppressive to a part of the members of the company and the allegation contained in para. 27 of Cyril's affidavit that my actions have done nothing but harm to the company is not only untrue but one which I very much resent. The company has been largely dependent since its incorporation on my long experience in and knowledge of philately which is and has been, in my humble opinion, of very great value to the company. I have never taken any step or done anything which has been harmful to the company in any way, neither have I ever done anything which has resulted in the affairs of D the company being conducted in a manner oppressive to any part of the members. I now realise that I am no longer in a position to dictate the policy of the company or to control completely the running of its business and I am prepared for the future to exercise only the ordinary powers of a director and to act in accordance with resolutions of the board. The reason why I have in the past acted as I have is that I have been under a misapprehension E as to my powers which was brought about by reason of the matters referred to in para. 5 and para. 13 of this affidavit."

Then there is his oral evidence during his cross-examination by leading counsel for the petitioners:

F "Q.—His Lordship was speaking at the same time as you with the result that I heard neither. Will you answer the question once more. Did you believe that you were entitled to disregard the decisions of the board of directors? A.—My answer is that as long as I held the control shares I considered I had and it was agreed with my sons that I should have it."

Then a little later:

G "*Milner Holland, Q.C.*: He said: 'As long as I hold the control shares, the answer is Yes'. ROXBURGH, J.: I will write it down and hand it to him: 'As long as I hold the control shares'—then what did he say? *Milner Holland, Q.C.*: 'the answer is Yes'."

Then, a little later, leading counsel for the petitioners said to the father:

H "Do sign it, sign it by all means. ROXBURGH, J.: I did not ask him to. I should not feel entitled to ask him to do that."

The father then signed the passage in the learned judge's notebook, and the learned judge said:

I "I will read it out so that it can go on the shorthand note. The written answer which he has given me is as follows: 'I still believe that I am entitled to disregard resolutions of the board so long as I hold the requisite proportion of the control shares.'"

Then, in the last paragraph of his second affidavit, the father said this:

"With reference to para. 6 of Mr. Hunter's affidavit, I was never advised by Mr. Hunter to the effect that without the addition of specific powers the mere conferring on me of the office of governing director had no effect, and did not give me power to control the board, and until so advised during the

* Under s. 222 (f) of the Companies Act, 1948.

course of these proceedings I had always thought that my position as such did confer on me such a power."

These passages appear to me to contain admissions by the father which are of great importance in this case. The learned judge seems to have considered, as appears from the passage in the judgment to which I have referred, that the father was aware of the true position at an earlier date than he was prepared to admit.

I should next say a few words on the scope and effect of s. 210 of the Act. It is in these terms, so far as material for the present purpose:

"(1) Any member of a company who complains that the affairs of the company are being conducted in a manner oppressive to some part of the members (including himself) or, in a case falling within s. 169 (3) of this Act, the Board of Trade, may make an application to the court by petition for an order under this section.

"(2) If on any such petition the court is of opinion—(a) that the company's affairs are being conducted as aforesaid; and (b) that to wind-up the company would unfairly prejudice that part of the members, but otherwise the facts would justify the making of a winding-up order on the ground that it was just and equitable that the company should be wound-up; the court may, with a view to bringing to an end the matters complained of, make such order as it thinks fit, whether for regulating the conduct of the company's affairs in future, or for the purchase of the shares of any members of the company by other members of the company or by the company and, in the case of a purchase by the company, for the reduction accordingly of the company's capital, or otherwise."

It is to be observed, first, that the person permitted to apply to the court under s. 210 is "any member of [the] company", and he must show

"that the affairs of the company are being conducted in a manner oppressive to some part of the members (including himself) . . ."

This indicates that the oppression complained of must be complained of by a member of the company and must be oppression of some part of the members (including himself) in their or his capacity as members or a member of the company as such. Secondly, it is to be noted that the section does not purport to apply to every case in which the facts would justify the making of a winding-up order under the "just and equitable" rule, but only to those cases of that character which have in them the requisite element of oppression. Thirdly, the phrase "the affairs of the company are being conducted" suggests, *prima facie*, a continuing process and is wide enough to cover oppression by anyone who is taking part in the conduct of the affairs of the company, whether *de facto* or *de jure*. Fourthly, the section gives no guidance as to the meaning of the word "oppressive", although it does, as already mentioned, indicate that the victim or victims of the oppressive conduct must be a member or members of the company as such. *Prima facie*, therefore, the word "oppressive" must be given its ordinary sense and the question must be whether in that sense the conduct complained of is oppressive to a member or members as such. Inasmuch as in the present case it is not in dispute that the facts would justify a winding-up order under the "just and equitable" rule and it is recognised that such an order would unfairly prejudice the complaining members, this would appear to be, in effect, the only question in issue.

There is no English case before this one in which an order has been made under the section, but there have been two such cases in Scotland, one of which has been the subject of an appeal to the House of Lords. The first of the Scottish cases is *Elder v. Elder & Watson, Ltd.* (1) (1952 S.C. 49). Inevitably the result of applications under s. 210 in different cases must depend on the particular facts of each case, the circumstances in which oppression may arise being so infinitely

A various that it is impossible to define them with precision. In *Elder v. Elder & Watson, Ltd.* (1), according to the headnote, the nature of the case was this.

B "In a petition presented under s. 210, it was averred that two of the petitioners, shareholders in a private limited company which was in effect a small family concern, had suffered oppression at the hands of other shareholders who had used their combined voting powers to remove these petitioners from their offices as directors and from their employment as secretary and factory manager respectively. It was further averred that this action had been taken against them at the instigation of a director who had had serious differences with one of them and who had sought successfully in this way to obtain control of the company for himself and his nominees. There was no averment that the business had been mismanaged to the detriment of the shareholders. Before presenting the petition, the petitioners had sought unsuccessfully to dispose of their shares to the company at a price to be fixed by arbitration.

C "Held (1) that s. 210 was intended to meet the case of oppression of members of a company in their character as such; (2) that the matters complained of by the petitioners affected them solely in the character of director or employee of the company, and there were thus no relevant averments of oppression for the purposes of the section; and (3) that there were no facts averred which would justify a winding-up order on 'just and equitable' grounds; and the petition dismissed as irrelevant."

D The Lord President, LORD COOPER, said (1952 S.C. at p. 55):

E "The applicant for relief is thus envisaged as one of an oppressed minority of shareholders. On such a petition the court can only act under the section on being satisfied of three matters:—(i) that the company's affairs are being conducted in a manner oppressive to some part of the members (including the petitioner); (ii) that to wind-up the company would unfairly prejudice that part of the members; and (iii) that otherwise the facts would justify the making of a winding-up order under the 'just and equitable' clause.

F "In the present case it is conceded that it would be quite unjustifiable to liquidate the company and that condition (ii) is satisfied. It remains to consider conditions (i) and (iii), which can best be examined together. The introduction into s. 210 of condition (iii) refers us back to the pre-1947 practice under the 'just and equitable' clause, and is a salutary reminder of the fact that the new remedy is not lightly to be accorded. Under the former practice winding-up has been ordered in many types of case which involved no true element of oppression to shareholders, e.g., where the substratum of the company had vanished, and such cases will doubtless continue to arise. On the other hand the justice and equity which led to the grant of a winding-up order have often been found in conduct reasonably capable of being described as 'oppressive' to some part of the company's members, the oppression being usually exerted by a person with predominating voting power which was employed for his own advantage to the detriment of a helpless minority. The decisions indicate that conduct which is technically legal and correct may nevertheless be such as to justify the application of the 'just and equitable' jurisdiction, and, conversely, that conduct involving illegality and contravention of the Act may not suffice to warrant the remedy of winding-up, especially where alternative remedies are available. Where the 'just and equitable' jurisdiction has been applied in cases of this type, the circumstances have always, I think, been such as to warrant the inference that there has been, at least, an unfair abuse of powers and an impairment of confidence in the probity with which the company's affairs are being conducted, as distinguished from mere resentment on the part of a minority at being outvoted on some issue of domestic

policy. The phrase 'oppressive to some part of the members' acquires a certain colour from its collocation in s. 165 with such stronger expressions as 'intent to defraud', 'fraud', 'misfeasance' or 'other misconduct', and the essence of the matter seems to be that the conduct complained of should at the lowest involve a visible departure from the standards of fair dealing, and a violation of the conditions of fair play on which every shareholder who entrusts his money to a company is entitled to rely. This, broadly speaking, was the class of case which the draftsman of s. 210 evidently had in mind, and the question is whether the petitioners have brought themselves within the scope of the section."

A little later LORD COOPER said this (*ibid.*, at p. 56):

"I also accept it that in the familiar 'deadlock' type of case the partnership and the small company may be virtually indistinguishable, and identical principles may fall to be applied to both alike. But this is not to say that we can import the detailed provisions of the Partnership Act into the Companies Act, still less that we can ignore the specific requirement of s. 210 that before applying that section we must be able to affirm 'oppression' of some part of the members of the company. While therefore I give full weight to the circumstance that we have here to deal with a small domestic concern, I do not feel free to deal with the case otherwise than under the terms of s. 210 alone."

Then LORD COOPER said (*ibid.*, at p. 57):

"It does not assist the petitioners to assert that the shareholders took sides in the dispute, for they had no option but to take sides, and the real complaint is that more of them sided with Walter Elder than with the petitioners. Moreover I search the petition in vain for any relevant averment that the petitioners have suffered in their character as members of the company. Qua members, their position does not seem to me to differ significantly from that of any other shareholder. The true grievance is that two of them, George Elder and James Glass, have lost the positions which they formerly held as directors and officers of the company. I do not consider that s. 210 was intended to meet any such case, the 'oppression' required by the section being oppression of members in their character as such. I do not think that a 'just and equitable' winding-up has ever yet been ordered merely because of changes effected in the board of directors or the dismissal of officers, and very strong grounds would be needed to justify such a step."

LORD KEITH said (1952 S.C. at p. 58):

"The difficulty is perhaps to define the limits within which s. 210 shall apply. It does not apply to all cases in which it would be just and equitable to wind-up a company, because some of these are cases in which it could not be said that there is oppression of any part of the members in the conduct of the affairs of the company. Apart from the Board of Trade, to whom I shall refer later, it is only a member who can invoke the section, and, in my opinion, this means a member in his capacity as member, and further, in my opinion, his only relevant ground of complaint is oppression of his rights as a member . . ."

A little later in his judgment LORD KEITH said (*ibid.*, at p. 59):

"But, apart from this, the question of absence of mutual confidence per se between partners, or between two sets of shareholders, however relevant to a winding-up, seems to me to have no direct relevance to the remedy granted by s. 210. It is oppression of some part of the shareholders by the manner in which the affairs of the company are being conducted that must be averred and proved. Mere loss of confidence or pure deadlock does not, I think, come within s. 210."

A LORD KEITH then said (*ibid.*, at p. 60):

"It is not lack of confidence between shareholders per se that brings s. 210 into play, but lack of confidence springing from oppression of a minority by a majority in the management of the company's affairs, and oppression involves, I think, at least an element of lack of probity or fair dealing to a member in the matter of his proprietary rights as a shareholder. Cases like that of *Loch v. John Blackwood, Ltd.* (2) ([1924] A.C. 783) and *Thomson v. Drysdale* (3) (1925 S.C. 311) might, I think, readily have come under s. 210. I doubt whether a case like *Re Yenidje Tobacco Co. Ltd.* (4) ([1916] 2 Ch. 426) could be brought under the section."

C I think what is said in that case as to the scope of s. 210 is, if I may respectfully say so, well founded, and the caution administered in regard to it should be borne constantly in mind when any application under s. 210 falls to be considered.

The other Scottish case is *Meyer v. Scottish Co-operative Wholesale Society* (5) (1954 S.C. 381), which came on first on the question of the relevance of the averments before the matters complained of had been proved in evidence and was further heard before the First Division after the facts had been proved (1957 S.C. 110). The report is an exceedingly long one owing to the complication of the transactions involved, but it was a case even more remotely related to the present case on its facts than was *Elder v. Elder & Watson, Ltd.* (1). *Meyer v. Scottish Co-operative Wholesale Society* (5) appears to have been a case in which a parent company was in control of a subsidiary company which also had a minority of independent members. A time came when trading conditions were such that it would be to the advantage of the parent company to do away with the subsidiary company, and the question, which the court answered in the affirmative, was whether the conduct of the parent company in seeking to achieve that result amounted to oppression or oppressive conduct of the affairs of the company within s. 210.

E I do not propose to take up time by citing at length from *Meyer v. Scottish Co-operative Wholesale Society* (5); but I will content myself by reading this one passage from the judgment of the Lord President, LORD COOPER (1954 S.C. at p. 391):

"... I am not prepared to state on the basis of mere averments that the company's affairs were not being conducted in a manner oppressive to the petitioners within the meaning of the section. In my view, the section warrants the court in looking at the business realities of a situation and does not confine them to a narrow legalistic view."

G Then when *Scottish Co-operative Wholesale Society, Ltd. v. Meyer* (5) came before the House of Lords (*ante*, p. 66), where the decision was affirmed, some observations were made by VISCOUNT SIMONDS and LORD MORTON OF HENRYTON to which I would refer. VISCOUNT SIMONDS said (*ante*, at p. 71):

H "My Lords, on the facts as I have outlined them and as they appear in greater detail in the judgments of their Lordships of the First Division, it appears to me incontrovertible that the society has behaved to the minority shareholders of the company in a manner which can justly be described as oppressive. It had the majority power and it exercised its authority in a manner 'burdensome, harsh and wrongful'—I take the dictionary meaning of the word. But, it is said, let it be assumed that the society acted in an oppressive manner; yet it did not conduct the affairs of the company in an oppressive manner."

I That last sentence referred to the question whether in that case the conduct of the parent company amounted to conducting the affairs of the subsidiary company, as distinct from those of the parent company, in an oppressive manner. No such complication enters into the present case. I attach importance to LORD SIMONDS' adoption of the meaning of "oppression" as "burdensome,

harsh and wrongful". LORD MORTON OF HENRYTON felt difficulty on the point which I have mentioned as one which does not arise in the present case, but he was able to agree with the decision of the House, as appears from this passage in his speech (ante, at p. 75):

" Suffice it to say that, in the end, I have reached the conclusion that there is evidence to justify the view that the affairs of the company were 'conducted in a manner oppressive' to the respondents. I am not disposed to give a narrow meaning to these words, having regard to the manifest object of s. 210. I am naturally assisted to my conclusion by the fact that the decision of the four learned judges of that Division (including LORD CARMONT, who had the advantage of seeing and hearing the witnesses) was unanimous, and by the fact that your Lordships are all of the same opinion."

Finally, as regards the cases, I would refer to two of those concerned with the application of the "just and equitable" principle as not without assistance in the present case. The first is *Thomson v. Drysdale* (3). The Lord President, LORD CLYDE, said this (1925 S.C. at p. 315):

" Now, in any case in which the shareholders who hold a preponderating interest in a company make it manifest that they intend to set at naught the security provided by company procedure, and to treat the company and its affairs as if they were their own property, it is impossible that the minority should retain any confidence in the impartiality or probity of the company's administration, and—according to the circumstances of each particular case—it becomes a question whether the minority are not entitled, as a matter of 'justice and equity' within the meaning of s. 129 (vi) of the Companies (Consolidation) Act, 1908, to have the company wound-up. It is always true that the majority are entitled to use their voting power in what they believe to be the interests of the company; and the petitioner's fellow-shareholder had no doubt been allowed to acquire an overwhelmingly preponderant power so far as votes were concerned. But whether he could have used that power, not only to annul the arrangements made in the directors' minutes—I assume he could—but also to acquire for himself the petitioner's touring business (for which the company had never paid a single penny) is a very different matter. In any case, he never attempted to use his voting power in the only legitimate way."

Then LORD SKERRINGTON said this (ibid., at p. 316):

" It must, however, be kept in view that this state of matters did not result from any underhand manoeuvring on the part of the respondent (who holds the 1501 shares), nor yet from any accidental circumstances. It resulted from the deliberate actings and contracts of the two shareholders, each of whom originally held a single share. Accordingly, in considering whether it is just and equitable that the company should be now wound up, the court must be careful not to allow itself to be made an instrument for relieving the petitioner from the natural and lawful consequences of his own actings and contracts. On the other hand, in circumstances like the present, it behoves the shareholder who has the 1501 votes to avoid any conduct which would reasonably lead to the inference that he fails to appreciate the fact that it is his duty to use his voting power in the interests of the company as a whole, and that he must not ignore the interest of the other shareholder or treat the company and its assets as if they were his own private property. Further, he must avoid acting in such a way as might reasonably be held to make it impossible for the other shareholder to co-operate with him in the management of the company."

The other case bearing on the just and equitable rule to which I would refer is *Loch v. John Blackwood, Ltd.* (2) in the Privy Council. In that case LORD SHAW

A OF DUNFERMLINE gave the opinion of the Judicial Committee, and I would refer to this passage ([1924] A.C. at p. 793):

“The present Lord President of the Court of Session (LORD CLYDE) in *Baird v. Lees* (6) (1924 S.C. 83 at p. 92) discusses the section and the ejusdem generis doctrine in exactly the same spirit. His words are as follows: ‘I have no intention of attempting a definition of the circumstances which amount to a “just and equitable” cause. But I think I may say this. A shareholder puts his money into a company on certain conditions. The first of them is that the business in which he invests shall be limited to certain definite objects. The second is that it shall be carried on by certain persons elected in a specified way. And the third is that the business shall be conducted in accordance with certain principles of commercial administration defined in the statute, which provide some guarantee of commercial probity and efficiency. If shareholders find that these conditions or some of them are deliberately and consistently violated and set aside by the action of a member and official of the company who wields an overwhelming voting power, and if the result of that is that, for the extrication of their rights as shareholders, they are deprived of the ordinary facilities which compliance with the Companies Acts would provide them with, then there does arise, in my opinion, a situation in which it may be just and equitable for the court to wind-up the company.’”

Having now dealt so far as I am able with the law to be applied, I turn to the particular matters of complaint alleged by the two sons in their petition. It should be remembered that they are to some extent in the nature of illustrations of the general course of conduct complained of in para. 16 of the petition. [His LORDSHIP reviewed the facts and examples of conduct* on which the petitioners relied and continued:] The question remains whether, on these facts, the petitioners were rightly granted the relief which ROXBURGH, J., thought fit to grant under s. 210. On this issue counsel for the father made, in effect, the following submissions. In stating them I am not attempting to quote his words; I merely give the general effect of his argument, as I understood it. First, he said that the sons should not be heard to complain since they acquired their shares through the generosity of their father, who, having built up the business, proceeded to turn it into a company and to hand over a major part of the beneficial interest in the form of shares to his sons virtually by way of gift. As to this, the sons did at all events pay for their preference shares, and if they had not paid anything, two of them at all events had long been working in the business, while the third gave up his career in the Colonial Office in order to take up employment in the business. Moreover, the question of consideration appears to me to be irrelevant, a mere matter of prejudice. Suppose the transaction was a mere matter of gift, the gift, if valid (and there is no suggestion that it was not) must surely have conferred the same rights as if the transaction had been for full consideration. The second point taken by counsel for the father was that the sons knew full well when the company was formed that the father was to retain control by means of his predominant holding of “B” shares so long as he lived. I agree, but I cannot concur with counsel in adducing from this that the sons must be taken to have assumed that the father would exercise his control irregularly by doing what he thought fit without reference to the board or in defiance of the board’s decisions. Then counsel’s third submission was that what was done by the father was not oppressive of the rights of the sons as members, but merely oppressive of their rights as directors. I cannot accept this. It appears to me that the sons as members, and not merely as directors, were oppressed by the singular conduct of the father. The oppression must, no doubt, be oppression of members as such, but it does not follow that the fact that the oppressed members are also directors is a disqualifying circumstance when the question of relief under

* These are summarised at p. 691, letter G, to p. 692, letter H, ante, (a)-(j).

s. 210 arises. I think that there may well be oppression from the point of view of member-directors where a majority shareholder (that is to say, a shareholder with a preponderance of voting power) proceeds, on the strength of his control, to act contrary to the decisions of, or without the authority of, the duly constituted board of directors of the company. Fourthly, counsel for the father said that the acts complained of might have been restrained by injunction in so far as they were acts done without the authority of the board. As to this, I do not think that a wrongdoer in this field can well complain that the person wronged might have chosen another remedy. Then fifthly, counsel said that the acts complained of were not in their result oppressive, because it cannot be demonstrated that the company suffered any loss from any of them. I cannot agree. The acts complained of were, I should say for the most part, calculated to damage the company in one way or the other. Sixthly, counsel said that the acts complained of might have been lawfully done by calling a general meeting and passing the requisite resolutions, ordinary or special. As to this, I think that the sons were at least entitled to require that the proper procedure should be applied. Then seventhly, counsel said that this is not a case of discrimination between different shareholders or classes of shareholders. I agree, but see no reason for holding that s. 210 is necessarily confined to cases of discrimination, although it is to be expected that cases calling for its application would most usually take that form. Finally, counsel submitted that the father got no pecuniary benefit out of what he did. That is not literally true, but even if it were, I do not think that it is essential to a case of oppression that the alleged oppressor is oppressing in order to obtain pecuniary benefit. If there is oppression, it remains oppression even though the oppression is due simply to the controlling shareholder's overweening desire for power and control and not with a view to his own pecuniary advantage. The result rather than the motive is the material thing.

Then, on the other side, the submissions of counsel for the petitioners were to this effect. (i) The question is whether the course of conduct complained of was "burdensome, harsh or wrongful" to shareholders, that is to say, a part of the shareholders, including the petitioners. (ii) If a person, relying on majority control in point of voting power, dispenses with the proper procedure for producing the result which he desires to achieve and simply insists on this or that being done or omitted, his conduct is oppressive because it deprives the minority of shareholders of their right as members of the company to have its affairs conducted in accordance with its articles of association. (iii) It is not shown that, if the father had acted strictly in accordance with the articles of association, he could have achieved his object. The proper procedure cannot be put on one side as mere machinery. It is the duty of the board to consider any proposal. If a majority shareholder desires to override the board, there must be a proper meeting, whether of the board or the company, and at least an opportunity of discussion. Moreover, if a majority shareholder sets about asserting his power in accordance with the articles and succeeds in point of numbers, he may be faced with questions as to fraud on the minority and so forth, which are burked by the expedient of simply doing what he chooses without ceremony on the ground that if it came to a vote he could outvote anyone.

In his judgment the learned judge, after saying that he adopted the reasoning of the Lord President, LORD COOPER, in *Meyer v. Scottish Co-operative Wholesale Society* (5) (1954 S.C. at p. 392), said this:

"That being so, the section seems to me to admit of no ambiguity. The word 'oppression' is a word in common use and understanding in the English language. I would, however, observe in passing that the section does not say 'who complains of acts of oppression'; it says 'that the affairs of the company are being conducted in a manner oppressive...'. In other words, I think it invites attention, not to events considered in isolation, but to events considered as part of a consecutive story; and it is

A because I take that view that I have not dealt (and do not propose to deal) with each of the items which I have enumerated one by one. But I must pause to dismiss the submission made by Mr. Russell [leading counsel for the father in the court below] to the effect, as I understood it, that the nature of the oppression that the section requires could be in some way affected by the use of the word 'minorities'. To start with, I can see no need to introduce any modification into the words of the statute, which seem to me to be sufficiently plain. Secondly, I do not think that the word 'minorities' was intended to be introduced at that point. I think the point about the word 'minorities' is that it is only where the voting control is elsewhere that a case for the application of the section arises. To take this case, if the voting control had resided where the beneficial interest in the ordinary shares resides, there would have been no need to invoke the section. The chairman [the father] would have been eradicated root and branch by this time. It is only because of the beneficial voting interest and his having voting control that it is necessary to invoke the section at all. I cannot think of any case where it would be possible to invoke the section if the voting control was in the hands of the persons who are alleged to have been oppressed; and that, I think, is the only and natural explanation of the word 'minorities' being there.

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"It remains, in my view, a question for the court to decide on the whole story, as revealed in the evidence, whether the affairs of the company are being—it has to be a state of affairs continuing at the date of the petition—conducted in a manner oppressive to some part of the members. I do not know that it has any particular bearing on the case, but this case is curious in that it is not a minority beneficial interest that is being oppressed, and that would be the normal case; it is a majority beneficial interest which is being oppressed because the voting control is placed in the hands of a minority beneficial interest. I reach the opinion—because that is what I have to do—that at the date of the presentation of this petition the affairs of the company were being conducted in a manner oppressive to the petitioners."

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Having given the best consideration I can to this not altogether easy case, I have come to the same conclusion, preferring the reasoning of counsel for the petitioners to that of counsel for the father and accepting the reasoning and conclusion of the learned judge. I am fortified in this view by the consideration that it has obviously become increasingly difficult, nay really impossible, for the business of this company to be carried on successfully as matters stood before the order of ROXBURGH, J., and that it is plainly in the best interests of all parties that an order in these terms, or substantially in these terms, should be made. No criticism of any importance of the form of the order made by ROXBURGH, J., has been made good before us. For these reasons I would dismiss this appeal.

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H **ROMER, L.J.:** I agree. At an early stage of his opening in this case counsel for the father suggested that even if the father had been shown to have been conducting the affairs of the company in an oppressive way, which counsel strenuously denied, nevertheless it was not open to the sons to base a petition under s. 210 on that footing because the sons had been given the bulk of their shares by the father and owed everything to his bounty, and they could not complain, even though other people in similar circumstances might. I think that that leaves entirely out of account the fact that the father did in fact create the company. He created proprietary interests in this business and he cannot now disregard the legal entity which was brought into being and the shares which were created therein. I do not know how long, on that argument, the sons would have to wait until they were permitted to complain. The second point was that the sons agreed that their father should govern the company, and, therefore, they must put up with it. I cannot believe that the agreement to his appointment as governing director was wholly unconditional on the way he was to govern,

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and surely the sons were entitled to assume that their father would exercise his power moderately and reasonably and give some effect, at least, to their own life directorships to which he had agreed. A

Viewing the evidence as a whole, no one could doubt but that the father acted oppressively in the sense in which that word is ordinarily used. He rode roughshod over his sons and everybody else, and dictated the general conduct of the company's affairs and its policy with an intolerant disregard of the wishes of his co-directors, and, indeed, in some instances in disregard of the best interests of the company itself. The question, however, is whether it has been shown within s. 210 of the Companies Act, 1948, that the affairs of the company were being conducted by the father in a manner oppressive to the shareholders, including the petitioners, who are in a voting minority. Counsel for the father said that Cyril and not the father was conducting the affairs of the company in London. I cannot accept that suggestion. It is quite true that Cyril was, as he said in evidence, conducting the day-to-day routine work in the London office, but it is quite obvious that the affairs in general of the company were conducted by the father and no one else, and I should imagine that the father himself would be the last person in the world to deny that. B C

In considering whether the way in which he conducted the company's affairs was oppressive, I agree with the learned judge that, although, naturally, attention must be paid to the various incidents of which the petitioners complain, taking those incidents by themselves, the court is concerned really to consider the history of the matter as a whole and to see whether a course of conduct by the father has been established which constitutes an oppression of the other shareholders. As my Lord has pointed out* the word "oppression" was defined by VISCOUNT SIMONDS in *Scottish Co-operative Wholesale Society, Ltd. v. Meyer* (5) (ante, p. 66 at p. 71) where he accepted the dictionary meaning "burdensome, harsh and wrongful", and I respectfully would adopt that definition of the word to be found in s. 210. With regard to that section, LORD MORTON OF HENRYTON, in his speech (ante, at p. 75) said that he was not disposed to give a narrow meaning to the word "oppression", having regard to the manifest object of s. 210. It is true that the mere use of voting power at board meetings or at a general meeting to secure the passing of resolutions, which the other members of the board or shareholders oppose, would not in general constitute oppression for the purpose of the section or for any other purpose. For a petition to succeed it must be shown that there has been oppression in a real sense of members qua shareholders and not merely a subordination of their wishes to the power of a voting majority. As to this, however, I accept the submission of counsel for the petitioners that shareholders are entitled to have the affairs of a company conducted in the way laid down by the company's constitution. Members are entitled to expect that their board shall perform its functions as a board and that the proceedings of the directors shall be carried out in a normal and orthodox manner. They are entitled to the benefit of the collective experience of the directors, and to expect that the directors and each of them can freely express their views at board meetings and that regard shall be had to what they say and to resolutions properly passed. If the board is browbeaten and either ignored or overruled by one of its number, in this case the father who was the chairman, in reliance on his superior voting power, the proprietary interests of the minority shareholders cannot fail to be affected and a case of oppression within s. 210 is, in my judgment, made out. That such has been the policy of the father since the inception of the company has been established by the evidence, in my view, beyond a shadow of doubt. The petitioners' grievance on this matter is stated generally in para. 16 of the petition which my Lord has read†, and I do not read D E F G H I

* Ante, at p. 701, letters H and I.

† Ante, at p. 695, letters F and G.

A again. An illuminating statement with regard to it is found in the father's first affidavit, where he said:

"I believe that the basis on which the company was formed entitled me to run the business and it was a breach of faith for my sons to deny it."

[As illustrations of the father's attitude as chairman, HIS LORDSHIP referred, in particular, to (a) the father's instructions to the secretary of the company that no board meetings were to be called without his agreement*; and (b) the matter of the renewal of the lease of the company's premises†. After reading the transcript of one of the board meetings to show the atmosphere which prevailed there (the sons and the father each having a solicitor present), HIS LORDSHIP continued:] We were told that Mr. Charles Russell, who appeared for the father in the court below, conceded that affairs had got to such a pass that a contributory's petition to wind-up the company on the ground that it was just and equitable to wind it up would have succeeded. I think that this concession was very rightly made and none the less so because the shareholders might in connexion with some, at least, of the father's activities have obtained relief by resorting to a different jurisdiction. It is true enough that the mere fact that it is just and equitable to wind-up a company on a contributory's petition does not in itself necessarily bring a case within s. 210, but when the ground for winding-up is oppression, it may well amount also to a ground for bringing s. 210 into play, as LORD KEITH pointed out in *Elder v. Elder & Watson, Ltd.* (1) (1952 S.C. 49). I am at all events abundantly satisfied that it does in the present case.

I would wish in conclusion to adopt a passage from the judgment of ROXBURGH, J., in this case where he said this:

"If [the father] assumed powers which he did not possess (and he certainly did that) and exercised them against the wishes of the shareholders who had major beneficial interests, but a minority of votes (and he certainly did that), that, in my opinion, is *prima facie* oppression. It is sufficient *prima facie* oppression to shift the burden of proof; and, therefore, as it seems to me, the burden of avoiding that conclusion rests on the usurper. So far from discharging that burden, the argument has left me with the firm conclusion that, looking over the whole story, the [father] has been so dominated by one or other of two collateral motives—either just lack of temper, or the motive of asserting and attempting to sustain an absolute overriding power of control in the face of opposition—that he has on many occasions acted in complete disregard of the interests of the company as a whole."

I agree with that passage from the learned judge's judgment, and I agree that the appeal should be dismissed.

WILLMER, L.J.: I agree that this appeal fails, and if it were not for the importance of the case I should have been content merely to express that view and say no more, but as the matters in issue here have been very fully debated and are of such serious consequence, particularly for Mr. Harmer, senior, I think it is right that I should endeavour to state, in as few words as I can, the reasons which have led me to my conclusion. The only question which in the event has to be decided in the case is whether or not the affairs of H. R. Harmer, Ltd. were being conducted in a manner oppressive to some part of the members, including the petitioners. The learned judge, in giving judgment on Apr. 30, 1958, pointed out that the word "oppression" is a word in common use and understanding in the English language. He did not have the advantage, which we have had, of the subsequent decision of the House of Lords in *Scottish Co-operative Wholesale Society, Ltd. v. Meyer* (5) (ante, at p. 66), but I think it is fair to say that the decision of the House of Lords in that case has abundantly justified what the learned judge in this case said with regard to the meaning of the word

* See p. 692, letter A, ante, i.e., item (c).

† See p. 692, letter G, ante, i.e., item (j).

"oppression". VISCOUNT SIMONDS was content to take its ordinary dictionary sense, that is to say, what the ordinary man would understand is the meaning of the word, and LORD MORTON OF HENRYTON said that he was not disposed to give a narrow meaning to the word. A

That being so, it seems to me that the question which arises in this case, as, indeed, in almost any other case of this character, is a pure question of fact to be determined in accordance with the circumstances of the particular case. In the course of the argument it was suggested that the approach to this issue of fact was in some ways analogous to the approach to the question of fact which arises in a matrimonial cause where the petition is on the grounds of cruelty. I am disposed to think there is some force in the suggestion that there is a similarity between the two proceedings, and I venture to make these two comments on the correct way to approach the question of fact which arises in a case such as this. B C
The first is that, in my judgment, it is quite impossible to lay down, a priori, certain categories of conduct which in all circumstances either are or are not capable in law of amounting to conduct which is oppressive within the meaning of the section; in other words, each case has to be examined in the light of its own particular facts and, I would venture to add, in the light of the personality of the individual persons concerned. The second matter to which I want to refer has really been dealt with by the learned judge and has been referred to by my Lords, and it is this, that one must be careful to study the course of conduct complained of as a whole. I would like to refer to what the learned judge said in his judgment in a passage which has already been read*, and which I venture to read again: D

"I would, however, observe in passing that the section does not say 'who complains of acts of oppression'; it says 'that the affairs of the company are being conducted in a manner oppressive . . .' In other words, I think it invites attention, not to events considered in isolation, but to events considered as part of a consecutive story. . ."

I respectfully venture to adopt that as the correct approach, and that is the approach which the learned judge made in this case. F

Now, approaching the case, as I think, in the right way, the learned judge had the inestimable advantage of hearing oral evidence from the two persons most immediately concerned with the dispute, Mr. Harmer senior (referred to herein-after as "the father") and his son Cyril, one of the petitioners. Where the learned judge below has had the advantage of actually seeing witnesses and hearing them cross-examined, we should naturally be slow to interfere with the conclusions of fact at which he has arrived. In this case, seeing those two witnesses and hearing their evidence was important, as I think, for two reasons. G
First, it was important in this case, as in all others, for the purpose of assessing their credibility as witnesses. As to that, the learned judge has told us something (the passage to which I refer has already been read†) about what he thought of the credibility of the father. Secondly, in a case like this, where so much depends on the personality of the principal persons concerned and on the way in which those personalities reacted on each other, it seems to me that the learned judge, who actually saw the persons concerned and saw them under stress in cross-examination, had abundant opportunity of weighing up the personality of the people concerned, a matter which I think is of vital importance in deciding whether the conduct of one was oppressive in relation to the other. H I
Having those inestimable advantages and having, as I have said, approached the question in the right way, the learned judge came to the conclusion that the petitioners' case was made out, and that the father had been guilty of conducting the affairs of the company in an oppressive manner.

* Ante, at p. 704, letter I.

† Ante, at p. 696, letters C to G.

- A I have no intention of going into detail in regard to any of the particular incidents to which my Lord has already referred, but viewing the conduct complained of as a whole, i.e., as a course of conduct extending over the years, it appears to me that there was abundant evidence to justify the learned judge in his conclusion of fact. Ever since what I may call the Australia incident in 1948, the evidence shows that by one means or another the father has sought to
- B impose his will in the conduct of the affairs of the company to the exclusion of the wishes of other people who might be concerned. Counsel for the petitioners pointed out in his address that the various matters complained of fell into different categories, according to the method adopted by the father. One method complained of was his use or abuse of his voting power, primarily to secure the election to the board of people who were his nominees. Another method which
- C he adopted was to use the mere threat of his voting power to impose his wishes on the rest of the board. The third method adopted was simply to go behind the backs of the board and, after a decision had been taken by the board, to take it on himself to countermand it on his own authority and to give his own instructions. So far as the election of members of the board were concerned, I would like to express my agreement with what has already fallen from my Lord. It is
- D not the mere fact that the father in this case sought to get his own friends on to the board; what is objected to, and, as I think, rightly objected to, was securing the election of the particular people concerned with the avowed object of securing people who would be "certainties", to use the word which the father himself used. But the most dangerous and most oppressive form of conduct is, I think, the habit that the father had of going behind properly constituted decisions of
- E the board and taking it on himself to countermand them. It seems to me that such conduct cuts at the very root of proper company procedure and makes it virtually impossible for the business of a company to be carried on. The result which it led to can well be seen in some of the transcripts of meetings which have been placed before us. I venture to think that it is an illuminating comment on the state of affairs which has arisen if it becomes necessary, whenever any meeting
- F is held, to have a recording machine which will take down every word that is said by anybody, and to have solicitors sitting at the elbows of the various parties. How it can be expected that a company's affairs will be properly conducted in that atmosphere, I do not understand. I am abundantly satisfied that all this led inevitably to damage to the interests of the company. There was some evidence of actual financial loss, for instance, in connexion with the failure to
- G renew the lease of the company's premises. Of far more importance than that, as it seems to me, was this very fact to which I have referred, that it was becoming increasingly difficult to carry on business at all; and I would add to that the damaging effect which the acrimonious discussions between the father and the other directors was having on the members of the staff, particularly the senior members of the staff. In this connexion I think it is not altogether without
- H significance that both the senior cashier and the secretary of the company should have sworn the affidavits which have been filed in support of the petition.

I It may be thought, possibly, that the best evidence of oppressive conduct in this case is to be found in the answer which the father himself gave in the course of his cross-examination and which, to make sure it was in accordance with what he wished to say, was written down in the learned judge's note book*. I venture to repeat the answer which was then given and recorded:

"I still believe that I am entitled to disregard resolutions of the board so long as I hold the requisite proportion of the control shares."

That was quite different from what he had said in the concluding paragraph of the affidavit which he had previously sworn. I do not pause to quote it, but the effect of it was to say that by that time he had recognised that it was not always

* See p. 697, letters F to I, ante.

possible for him to have his own way, and that his previous efforts to do so had been under a misapprehension. Counsel for the petitioners has argued before us that at any rate since 1949 the father, for all that he said in his affidavit, has in fact known perfectly well, or at least has had the means of knowing, that he was no longer entitled to control the company. Reference has been made to advice given by a solicitor in 1949, and again to the repetitive advice given by the solicitor who sat by the father at the board meetings in 1955, 1956 and 1957. As has been pointed out already, the learned judge appears to have accepted the contention of counsel for the petitioners and to have come to the conclusion that the father knew perfectly well that he was going outside his powers. For my part, I doubt very much whether it makes very much difference whether the father did or did not know that he was exceeding his powers, because, in the view which I take, oppressive conduct would not cease to be oppressive merely if it were unconscious, although, of course, it may be said—if I may be forgiven for once more borrowing a phrase used in connexion with a matrimonial cause—"That which is done consciously strikes with a sharper edge". It seems to me that the question whether the conduct complained of was conscious or unconscious is more material on the question of what relief ought to be accorded. If, as the learned judge thought, the father persisted in his conduct well knowing it to be wrong, there can, of course, be less assurance of the discontinuance of such conduct in future, and, therefore, possibly all the more need for a stringent order to protect the interests of the shareholders. In conclusion, without discussing it in detail, I desire to associate myself with what my Lord has said with regard to the submissions made to us by counsel for the father, and I refer particularly to the submission which he made to us that it does not lie in the mouth of the petitioners to complain, having regard to the facts, first, that they acquired their shareholding very largely by way of gift in the first instance from the father himself, and, secondly, that from the outset of the formation of the company it was recognised that the father intended to retain control.

For these reasons, and for those which my Lords have already given, I do not think that there is any other course open to us but to dismiss the appeal. I am satisfied that the company was suffering damage, and is in danger of suffering further damage from the oppressive manner in which its affairs were conducted by the father; and I am satisfied that the petitioners, as shareholders (and I stress the words "as shareholders") and not merely as directors, were suffering and are in danger of suffering further from the damage inflicted on the company.

Appeal dismissed. Leave to appeal to the House of Lords refused.

Solicitors: *Haslewoods*, agents for *Bosley & Co.*, Brighton (for the chairman of the company, the father); *Henry Pumfrey & Son* (for the petitioners, the sons).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

A

R. v. CUNNINGHAM.

[COURT OF CRIMINAL APPEAL (Lord Parker, C.J., Cassels and McNair, JJ.), December 8, 1958.]

B

Criminal Law—Murder—Provocation—Defence available only on a charge of murder, not on a charge of any lesser offence.

The defence of provocation is available only on a charge of murder to reduce the crime to manslaughter; the defence of provocation is not available on a charge of any lesser offence than murder, as, for example, malicious wounding.

C

Observations on provocation by VISCOUNT SIMON in *Holmes v. Public Prosecutions Director* ([1946] 2 All E.R. at pp. 127, 128) applied.
Appeals dismissed.

[As to the defence of provocation, see 10 HALSBURY'S LAWS (3rd Edn.) 710-713, paras. 1362, 1363; as to the admissibility of evidence of the prisoner's bad character, see *ibid.*, 447, para. 823.]

D

For cases on the effect of provocation, see 15 DIGEST (Repl.) 938, 939, 8980-8993; and for cases on cross-examination as to character, see 14 DIGEST (Repl.) 511-519, 4942-5019.]

Case referred to:

(1) *Holmes v. Public Prosecutions Director*, [1946] 2 All E.R. 124; [1946] A.C. 588; 115 L.J.K.B. 417; 175 L.T. 327; 15 Digest (Repl.) 941, 9021.

E

Appeal.

These were appeals by John Cunningham, the appellant, against his conviction and sentence for malicious wounding at Worcester County Quarter Sessions on Oct. 2, 1958; the appellant was sentenced to five years' imprisonment. The ground of appeal was that the deputy chairman of quarter sessions wrongly allowed the prosecution to cross-examine the appellant as to his previous convictions; cross-examination was allowed as a result of questions which were put by counsel for the appellant to a witness for the prosecution, one Trueman, the victim of the malicious wounding, in order to establish provocation which was put forward by the appellant as a defence. The relevant facts appear in the judgment of the court delivered by LORD PARKER, C.J.

G

R. H. Tucker for the appellant.

M. B. Ward for the Crown.

LORD PARKER, C.J., delivered the following judgment of the court: This appellant was convicted at Worcester County Quarter Sessions of malicious wounding and he was sentenced to five years' imprisonment. He now appeals to this court against his conviction and his sentence.

H

The short facts were these: The appellant was apparently travelling on a bus with his dog and had a cane or a whip with him, and as he moved to get off the bus he passed another passenger called Trueman, and according to the appellant, Trueman said: "Oh, you are getting off here, Jack, I thought you were coming to Droitwich with me". Thereupon the appellant made a most savage attack on Trueman, hitting him about the face and as a result he had a wound in the ear, abrasions on the hand and wrist and an injury to the left eye.

I

The defence put up at the trial was that that remark made by Trueman was intended as a suggestion that he, the appellant, should go with Trueman and commit some homosexual offence, and it was by reason of that that the appellant was provoked, as he said, and attacked Trueman. In the course of the trial, counsel for the appellant, in cross-examining Trueman, said this:

"I must suggest that by that remark you meant and he understood you to mean that you were to go together and behave in a homosexual manner?" A.—Well, really that is fantastic, and I think that it is incredible because do you think—"

Thereupon the deputy chairman quite rightly interrupted and asked counsel for the appellant if he realised where this question was leading. Counsel persisted and went on a little later:

"Did I have your [Trueman's] answer to that question? A.—I said that it would be incredible that I should make any suggestion of any kind."

Then the deputy chairman wrote down the answer: "I did not suggest that he [the appellant] should go to Droitwich and behave in a homosexual manner". As the result of that, when the appellant went into the witness-box the prosecution sought to cross-examine him as to his previous convictions, and the deputy chairman allowed that to be done with the result that previous convictions for violence, no less than four in number, were brought out and were before the jury.

The appeal is based on the ground that leave to the prosecution to cross-examine the appellant as to his previous convictions ought never to have been allowed. That is put forward in this way: that if provocation was a proper defence in an action of this sort, then counsel must be allowed to put that question to the complainant, the victim, without having the appellant's convictions brought out in court. I, for myself, think that even if provocation were a proper defence a question such as was put in this case must of necessity bring in the character of the prisoner, but it seems to this court to be unnecessary to determine that question because the court is quite clearly of opinion that in such a case as this, a case of malicious wounding, there is no such thing as a defence of provocation. The defence of provocation only arises in a murder case as a defence which will reduce murder to manslaughter. That, it seems to us, is made perfectly clear by VISCOUNT SIMON in *Holmes v. Public Prosecutions Director* (1) ([1946] 2 All E.R. 124). It is true that he says this (*ibid.*, at p. 127):

"The whole doctrine relating to provocation depends on the fact that it causes, or may cause, a sudden and temporary loss of self-control whereby malice, which is the formation of an intention to kill or to inflict grievous bodily harm, is negated."

There VISCOUNT SIMON was dealing and dealing only with a defence of provocation in a murder case. The matter is put perfectly clearly by him ([1946] 2 All E.R. at p. 128) where, after referring to the fact that provocation may reduce murder to manslaughter, he goes on:

"In the case of lesser crimes, provocation does not alter the nature of the offence at all: but it is allowed for in the sentence."

Accordingly, in the judgment of this court the defence of provocation was not open to this appellant, and if the defence of provocation was not open to the appellant there was no defence, and the fact that his convictions were before the jury could have made no difference at all.

I should mention that there is yet another difficulty in the way, viz., that even if provocation could be a defence there is no suggestion that words alone, except in the case of the Homicide Act, 1957*, are sufficient to found a defence of provocation. For these reasons the appeal against conviction is dismissed.

* Section 3 of the Homicide Act, 1957 (37 HALSBURY'S STATUTES (2nd Edn.) 175), provides: "Where on a charge of murder there is evidence on which the jury can find that the person charged was provoked (whether by things done or by things said or by both together) to lose his self-control . . ." the question of provocation shall be left to the jury.

- A As regards the appeal against sentence, it is true that the appellant was given the maximum sentence, but having regard to his record of violence*, there was no surprise in that. Both appeals accordingly are dismissed.

Appeals dismissed.

- Solicitors: *Philip Baker & Co.*, Birmingham (for the appellant); *Thomas B Horton & Sons*, Bromsgrove (for the Crown).

[*Reported by WENDY SHOCKETT, Barrister-at-Law.*]

C

KELLY v. LOMBARD BANKING, LTD.

- D [COURT OF APPEAL (Lord Denning, Hodson and Ormerod, L.J.J.), November 28, 1958.]

Hire-Purchase—Agreement—Initial payment in consideration of option to purchase when all rental payments made—Execution levied against hirer—Termination of agreement by owners—Whether initial payment recoverable as on a total failure of consideration.

- E A hire-purchase agreement in respect of a motor vehicle provided—
 “2. The hirer agrees (a) To pay on the signing of this agreement the initial payment of £186 2s. set out in the schedule hereto in consideration of the option to purchase contained in cl. 3 (b) hereof. Credit for such payment shall be given to the hirer only in the event of such option to purchase being exercised by him . . . 3. The owners agree . . . (b) that if the hirer
 F shall punctually pay the monthly hire rentals and all other sums due under this agreement and shall strictly observe and perform all the terms conditions and obligations on his part contained in this agreement, he shall have the option to purchase the vehicle for the sum of 20s.” The hirer made the initial payment as required but before completing the monthly payments
 G had execution levied against him by a judgment creditor, and under a provision in the contract the agreement was terminated by the owners and the vehicle was retaken by them. He brought an action for recovery of the initial payment on the ground of total failure of consideration in that he had never received the benefit of the option to purchase, because the owners had terminated the agreement.

- H **Held:** the initial payment could not be recovered, for the option to purchase had existed from the date of the agreement and payment of the £186 2s. although its exercise was subject to the fulfilment of his obligations by the hirer.

Appeal dismissed.

- I [As to the rights of parties on the determination of a hire-purchase agreement, see 19 HALSBURY'S LAWS (3rd Edn.) 550, para. 891; and for cases on the subject, see 3 DIGEST 95-98, 251-268.]

Appeal.

The hirer appealed against an order of His Honour JUDGE DALE in Westminster County Court made on June 12, 1958, dismissing an action brought by the

* The appellant was sentenced to five years' imprisonment. He had four previous convictions for offences of violence.

hirer claiming the return of an initial payment of £186 2s. made by him to the owners under a hire-purchase agreement in respect of a Jaguar car. He claimed that the payment was recoverable by reason of the total failure of the consideration for which it was expressed to be made, an option to purchase the car, through the owners' termination of the agreement and retaking of the car, following the levy of execution against him by a judgment creditor.

L. J. Davies for the hirer.

S. Terrell for the owners.

LORD DENNING: This is an interesting point which has come before the court for the first time, namely, whether the hirer under a hire-purchase agreement with a finance company can get back his initial payment. The facts are agreed. No evidence was taken in the court below. A hire-purchase agreement was made on Dec. 8, 1954, by which Lombard Banking, Ltd., the owners, let a Jaguar motor car on hire to the plaintiff, Mr. Kelly, the hirer, who had to make an initial payment of £186 2s. and also had to make twenty-one monthly hire rentals of £16 11s. 5d. In the result, after paying an extra 20s., and exercising an option to purchase, he would get the car for £534 1s. 9d.

The hirer made the initial payment of £186 2s., and he paid some of the monthly instalments, not altogether regularly, but quite a large number of them, until February, 1956, when he had paid, in addition to the £186 2s. initial payment, another £233 4s. 2d.; so he had paid £419 6s. 2d. altogether. Then he had execution levied against him in some other matter altogether by a judgment creditor. Thereupon, acting in pursuance of a provision to that effect in the hire-purchase agreement, the defendants took the car back, and kept it. Out of the total of £534 payable they have had £419 and they have now also got the car.

The hirer brings this action claiming that in the circumstances he is entitled to a return of the initial payment of £186 2s. I do not know of a case before where a man whose car has been retaken lawfully has said "I want my initial payment back". Still, if it is a good claim, the novelty of it is no answer to it.

Counsel for the hirer has put forward a very ingenious argument. He invites us to look at this hire-purchase agreement and see what it contains about this initial payment:

"(2) The hirer agrees (a) To pay on the signing of this agreement the initial payment of £186 2s. set out in the schedule hereto in consideration of the option to purchase contained in cl. 3 (b) hereof."

Clause 3 provides:

"The owners agree . . . (b) that if the hirer shall punctually pay the monthly hire rentals and all other sums due under this agreement and shall strictly observe and perform all the terms conditions and obligations on his part contained in this agreement, he shall have the option to purchase the vehicle for the sum of 20s."

Counsel says that this £186 2s. was paid for the option to purchase, but he never got an option to purchase, and, therefore, the consideration fails. He says that the position is like that where a payment in advance is made for property and the property is never conveyed, in which case the payer can get the money back subject to a cross-claim for damages if it is his fault that the contract has not been effected. Likewise, says counsel, this is a payment in advance for an option to purchase which has never come into being. He says that, on the wording of the clause, the option did not come into being until the end of the hiring when all the payments had been made. It never came into being in this case because the owners terminated the hiring and in the circumstances there has been no consideration for this payment, and it ought to be returned.

- A** I cannot agree with that interpretation of the contract. It seems to me that the option to purchase is an existing right which exists as from the date of this agreement. It is true that it is subject to conditions: it is subject to the hirer's fulfilling his obligations in order to be entitled to exercise it. Nevertheless the option to purchase is an existing right as from the moment of signing the contract and the payment of the money. So he has got what he has paid for. He has to
- B** fulfil the conditions in order to exercise the option ; but he has paid for an option which he has got. This interpretation of the clause seems to be borne out very much by the very next sentence in cl. 2 (a):

“Credit for such payment shall be given to the hirer only in the event of such option to purchase being exercised by him.”

- C** That seems to me to indicate that he does not get his money back either by way of credit or in cash, unless he exercises the option to purchase. I need not refer to all the various other clauses because that is the only clause which counsel for the hirer relies on so as to distinguish this agreement from the many other hire-purchase agreements with which one is familiar, in which no one could suggest that the hirer is entitled to recover his initial payment.

- D** I see the hardship on the hirer. I often think that it is hard under these hire-purchase agreements when the hirer has parted with his money and the owners take both the car and the money: but there is the law. Notwithstanding the ingenious argument of counsel for the hirer, I do not think that he is right. I agree with the judgment of the county court judge, and I think that this appeal must fail.

- E**
- HODSON, L.J.:** I am of the same opinion. I think that the construction of this agreement is plain. There was no failure of consideration. The £186 2s. was paid in consideration of the option to purchase contained in cl. 3 (b). Clause 3 (b) says if the hirer shall punctually pay the monthly hire rentals, and so forth, he shall have the option to purchase the vehicle for the sum of 20s. The option
- F** was bought for £186 2s. notwithstanding that it could not be exercised until after certain conditions had been fulfilled. I agree that the appeal fails and must be dismissed.

ORMEROD, L.J.: I agree, and I have nothing to add.

Appeal dismissed.

Solicitors: *Stanley & Co.* (for the hirer); *Victor Mishcon & Co.* (for the owners).

[*Reported by F. A. AMIES, ESQ., Barrister-at-Law.*]

A

Re D (an infant).

[COURT OF APPEAL (Lord Denning, Hodson and Ormerod, L.JJ.), November 28, 1958.]

Adoption—Illegitimate child—Power to make order in favour of unmarried mother—Adoption Act, 1950 (14 Geo. 6 c. 26), s. 1 (3).

B

An adoption order may be made under the Adoption Act, 1950, s. 1 (3), authorising an unmarried mother to adopt her illegitimate child.

Appeal allowed.

[**Editorial Note.** In *Re C. (an infant)* ([1937] 3 All E.R. 783) an adoption order was made under the Adoption Act, 1926 (since repealed), in favour of the mother of an illegitimate child, she being then married to a husband who was not the child's father. The Adoption Act, 1950, will be replaced at the beginning of April, 1959, by the Adoption Act, 1958, of which s. 1 (3) is in the same terms as in the Act of 1950.

C

As to restrictions on the making of adoption orders, see 21 HALSBURY'S LAWS (3rd Edn.) 231, para. 506.

For the Adoption Act, 1950, s. 1, s. 2, see 29 HALSBURY'S STATUTES (2nd Edn.) 468.]

D

Appeal.

The mother appealed against an order of His Honour JUDGE CLOTHIER, in Lambeth County Court, made on May 21, 1958, refusing to make an adoption order in favour of the applicant in respect of her illegitimate daughter, an infant. The grounds of appeal were, inter alia, that the judge misdirected himself in directing himself that s. 1 (3) of the Adoption Act, 1950, did not authorise the adoption by an unmarried mother of her illegitimate child or alternatively that such adoption should be limited to special cases; and that, on the inferences of fact and law, he was wrong in holding that the only reason for or advantage to be gained from the proposed adoption was the removal of the stigma of illegitimacy from the child.

E

F

R. W. Vick for the applicant.

H. E. Francis for the respondent.

LORD DENNING: In this case the mother of an illegitimate child seeks an adoption order. The judge has refused it. She appeals to this court. The mother is thirty-four years of age, the child, a girl, was born on Jan. 14, 1956, so the child is two years old, nearly three. The father was a married man living with his wife. The mother has had no communication with the father since the child was born, and she has not tried to make him responsible for the support of the child.

G

H

The mother, when the child was eighteen months old, obtained employment as resident housekeeper with a lady who lives in the south of London. The mother receives a wage of £2 10s. a week and full keep of her daughter and herself. The child and the mother each have a bedroom, and the child's room has been completely decorated and furnished by the employer. There is a good garden. Another lady lives in the house with the employer, and there is no doubt that these two ladies are very attached to the child and very interested in her welfare and education and they want the mother and the child to continue to live with them.

I

When the mother applied for an adoption order so that the child could be adopted by her, the case was inquired into, as the rules provide, by the welfare officer of London County Council, who, after stating the facts, reported that the care bestowed on the infant was satisfactory, and that the adoption order would

A appear to be in the infant's best interests. He recommended that a full order should be made. But when the case was inquired into by the county court judge, he refused to make the order. He pointed out that the welfare officer in his report had said that the mother was anxious to remove "the stigma of illegitimacy" from the child. He said:

B "No other reason for, or advantage to be gained from, the proposed adoption was advanced either by the applicant herself or by the welfare officer".

He refused to make the order because he said the Adoption Act, 1950, was not

C "designed or intended to be used simply for the purpose of 'removing the stigma of illegitimacy'. An adoption order if granted in this case, would no doubt soon become common form and illegitimacy would automatically be abolished in this country."

I find myself unable to agree with the reasoning of the judge. If one reads the words of s. 1 of the Adoption Act, 1950, it is plain to my mind that it contem-

D plates an adoption order being made in the circumstances which are now before the court. Section 1 (3) provides:

"An adoption order may be made authorising the adoption of an infant by the mother or father of the infant, either alone or jointly with her or his spouse."

E Section 2 (1) says:

"An adoption order shall not be made in respect of an infant unless the applicant [is over a certain age] or (c) is the mother or father of the infant."

Those sections seem to me to contemplate this very case*. But the matter is carried much further by s. 12 (2) of the Act which provides that where an affilia-

F tion order is in force with respect to an infant and the infant

"is adopted by his mother, and the mother is a single woman, the order [i.e., the affiliation order] shall not cease to have effect . . . upon the making of the adoption order . . ."

G That shows that, if the mother of an illegitimate child gets an affiliation order against the father, and afterwards gets an adoption order herself, the order against the father still operates, so as to make him pay for the child.†

The judge has asked what advantage is gained by making an adoption order. In property matters there are several potential advantages. An illegitimate child, according to the old common law, was a child of nobody: so that, if the

H mother died without making a will, or the grandmother or grandfather died without making a will, none of their property would ever go to the illegitimate child, because it was no relation in law to them. It was of no kin to anyone. If money was left to children by will, it never went to an illegitimate child, since the word "children" was always construed as referring only to legitimate children. That old law has been altered in part, but only in a very small part,

I by s. 9 of the Legitimacy Act, 1926. Now, if the mother of an illegitimate child dies without leaving a will, and has no legitimate children, then the illegitimate child can take as next of kin of the mother. That is the only alteration. In all

* See, also, s. 27 (1) of the Children Act, 1958, which will enable an adoption order in respect of an illegitimate child adopted by one of his or her parents to be revoked if the child is rendered legitimate on the parents' marriage. The Act comes into force on Apr. 1, 1959, but ss. 18-36 will then be superseded by the Adoption Act, 1958.

† See, further, Children Act, 1958, s. 22 (4).

other respects the old law remains. If the mother of an illegitimate child marries and has legitimate children, the illegitimate child is still excluded on an intestacy; whereas, if an adoption order is made, the illegitimate child ranks equally with the other legitimate children. Again, if the mother dies before the grandmother and the grandmother dies intestate, the illegitimate grandchild is excluded from any benefit in the grandmother's estate: whereas, if an adoption order is made, it will be entitled to a share. Again, if the mother, or anyone else, leaves a will leaving money to the "children" of this mother, the illegitimate child will take nothing: whereas, if an adoption order is made, the illegitimate child will rank as a child in the full sense of the law*. So it does make a considerable difference if an adoption order is made. A B

The judge seems to think that by making an adoption order the child is rendered legitimate. That is not the case. Illegitimacy and adoption are entirely different matters. The child still remains illegitimate, but being adopted it becomes in law for all purposes a child of its mother and thereafter suffers none of the disabilities which attach to illegitimacy. Furthermore, as ORMEROD, L.J., pointed out, the child when adopted is registered in the adopted children's register, and that entry is received in evidence as if it were an entry in the register of births; so that, if an application has to be made for the child to go to a school, or any other place where the entry is necessary, then the entry in the adopted children's register can be used. C D

So it seems to me to be clear that there are advantages to the child if an adoption order is made. There must, of course, always be an inquiry whether the mother is a suitable person to be given an adoption order and whether the home is suitable. All the circumstances must be taken into account, but it is certainly no bar that the child is illegitimate. E

I am glad to find that this court came to the same conclusion in 1957 in another case where the county court judge had taken the same view as this county court judge has taken here. The case was heard in camera so that it was not reported, and there is no record of the judgment, so far as we can find, anywhere. If it had been reported, no doubt we should not have had occasion to hear this case, because everybody would have known what the position is. We have been told that up till now eighty-seven adoption orders have been made in favour of mothers of illegitimate children. By our decision today we affirm that those orders have been rightly made within the jurisdiction of the county court judges concerned. I think that this appeal should be allowed and an adoption order should be made. F G

HODSON, L.J.: I agree. The main question which arises on this appeal came before this court, of which I was a member, on Feb. 6, 1957, where a learned county court judge had refused to make an adoption order on the application of an unmarried mother on the ground that he did not think the Adoption Act should be used to cover up the frailty of women placed in such circumstances. That really is the situation here; but it ought to be made plain that the Adoption Act, 1950, to the sections of which my Lord has referred, contemplates by the very terms of the Act itself in s. 1, s. 2 and s. 12, that an unmarried mother may well be the applicant for an adoption order. The exercise of the jurisdiction of the court is required in order to ascertain whether the mother or the applicant for the adoption order is able to look after the child and attend to the welfare of the child, the welfare of the child being the paramount object of the Act. In this case it is quite clear that the child will be well cared for in the home in which the mother is, where she is in the employment of a good employer who has H I

* See, generally, s. 13 of the Adoption Act, 1950, and s. 22 of the Children Act, 1958.

A done her best for the child and obviously has the welfare of the child at heart. Indeed, the welfare officer of London County Council, who has reported to the court, supported the application, as he was satisfied as to the prospects of the future welfare of this child. Therefore, there is no doubt that, in the exercise of the court's discretion, this order ought to be made.

B It only remains to emphasise that an applicant for an adoption order in such circumstances is not handicapped by the fact that she herself is the unmarried mother of the child she seeks to adopt.

ORMEROD, L.J.: I agree, and there is nothing that I wish to add.

Appeal allowed.

C Solicitors: *William Sturges & Co.* (for the applicant); *Solicitor, London County Council* (for the respondent).

[*Reported by F. A. AMIES, ESQ., Barrister-at-Law.*]

D

NOTE.

E KHATIJABAI JIWA HASHAM *v.* ZENAB D/O CHANDU NANSI,
WIDOW AND EXECUTRIX OF HAJI GULAM HUSSEIN HARJI
(*deceased*).

[PRIVY COUNCIL (Lord Tucker, Lord Cohen and Mr. L. M. D. de Silva), November 5, 1958.]

F *Privy Council—Practice—Appeal—Withdrawal of appearance—Effect of withdrawal on appeal—Judicial Committee Rules, 1957 (S.I. 1957 No. 2224), r. 34.*

[**Editorial Note.** The Judicial Committee Rules, 1925, have been revoked and were replaced on Feb. 1, 1958, by the Judicial Committee Rules, 1957

G (S.I. 1957 No. 2224).

As to the non-prosecution of an appeal before the Judicial Committee, see 9 HALSBURY'S LAWS (3rd Edn.) 387, para. 906.]

Petition.

H On Dec. 7, 1957, the Court of Appeal for Eastern Africa granted to the petitioner, Khatijabai Jiwa Hasham, leave to appeal to Her Majesty in Council from a judgment of that court dated Mar. 29, 1957, which affirmed a judgment of the Supreme Court of Kenya dated July 26, 1956, ordering that a contract whereby the petitioner (who was the defendant) had agreed to sell certain land at Nairobi should be specifically performed. On Dec. 19, 1957, the petitioner, by the solicitors then acting for her and on her behalf, entered an appearance
I in the appeal at the Privy Council Office, pursuant to the Judicial Committee Rules, 1925, r. 21. On Mar. 14, 1958, after correspondence between the solicitors and the petitioner, the solicitors withdrew the appearance. The petitioner instructed new solicitors, but the petition stated that they in fact took no further steps in the appeal, and, in particular, did not take any of the steps prescribed in r. 86,* to wit, to give notice in writing of the change of agents to the registrar

* The relevant rules at this time were the Judicial Committee Rules, 1957; the numbers of r. 34 and r. 86 are the same in those of 1925 and those of 1957.

and to the outgoing agents, and to amend the appearance accordingly. By a letter dated Apr. 16, 1958, the registrar informed the registrar of the Court of Appeal for Eastern Africa that the petitioner's appeal had been dismissed for want of prosecution under and by virtue of r. 34.* The petitioner applied for leave to restore the appeal but her petition was dismissed on July 16, 1958. The petitioner now sought an order that her appeal was still pending.

D. N. Pritt, Q.C., and A. R. Campbell for the petitioner.

Dingle Foot, Q.C., and T. O. Kellock for the respondent.

LORD TUCKER said that their Lordships would humbly advise Her Majesty that the petition should be allowed and an order made as prayed in the petition that notwithstanding the order made on July 30, 1958, dismissing the petitioner's application for leave to restore, and notwithstanding all or any other matters or steps that might have occurred or been taken, the appearance entered by the original solicitors on Dec. 19, 1957, still stood as an effective appearance and that the appeal was still pending. Their Lordships further ordered that the period prescribed by r. 22 should be extended until ten days from the date of the Order in Council.

Petition allowed.

Solicitors: *Theodore Goddard & Co.* (for the petitioner); *Herbert Oppenheimer, Nathan & Vandyk* (for the respondent).

[Reported by G. A. KIDNER, ESQ., Barrister-at-Law.]

PRACTICE DIRECTION.

PATENTS APPEAL TRIBUNAL.

Patent—Practice—Appeal tribunal—Public hearing—Jurisdiction to direct hearing or judgment to be in public.

At any sitting of the Patents Appeal Tribunal the tribunal may either of its own motion, or on the application of any party, direct that an appeal shall be heard in public, or that the decision of the tribunal shall be given in public.

By direction of the
PATENTS APPEAL TRIBUNAL.

Dec. 12, 1958.

[END OF VOLUME THREE.]



* See footnote, p. 719, ante.

